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A HISTORY OF MATRIMONIAL INSTITUTIONS

CHIEFLY IN ENGLAND AND THE UNITED STATES WITH AN INTRODUCTORY ANALYSIS OF THE LITERATURE AND THE THEORIES OF PRIMITIVE MARRIAGE AND THE FAMILY

BY

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VOLUME ONE

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TO

Alice Frost Howard

HER HUSBAND DEDICATES THIS BOOK IN
GRATEFUL RECOGNITION OF HER
AID IN MAKING IT

DEC 27 1951

PREFACE

It is an encouraging sign of advancing culture that history is gaining a deeper and broader meaning. We are really becoming interested, not merely in our political, but also in our entire biological, psychological, and social evolution. Although such phrase-making is nearly always misleading, there would perhaps be more truth in saying that "history is past sociology and sociology present history" than in Freeman's well-known epigram. In particular, the human family, with all that the word connotes, is commanding greater attention. Yet there is urgent need that its rise and social function should have far more earnest study than they now receive. The family and its cognate institutions ought to enter more fully into popular thought; and they should have much larger relative space in the educational program. From the home circle to the university seminar they are worthy to become a vital part of systematic social training. In the hope of aiding somewhat in winning for them due scientific recognition, this book is written. It seems not impossible that a sustained history of the matrimonial institutions of the English race in its "three homes" may prove a positive advantage, especially in gathering the materials and planning the work for more detailed investigations. Moreover, a thorough understanding of the social evolution of any people must rest upon the broader experience of mankind. Accordingly, in Part I the attempt is made to present a comprehensive and systematic analysis of the literature and the theories of primitive matrimonial institutions.

Preliminary reference to another portion of the book may perhaps be permitted. The anxious attention of the legal

and social reformer is being especially directed to the character of our state legislation regarding marriage and divorce. To him, therefore, it is hoped, the last three chapters may prove helpful. Summaries of the statutes as they stood at particular dates have indeed appeared. The digest contained in the government *Report* is of great value for the time of its compilation; but no attempt seems ever to have been made to provide a systematic historical record. In these chapters—the result of several years' labor—the laws of all the states and territories enacted since the Revolution have been analyzed with some regard for details. No pains have been spared to gain accuracy; yet it would be rash to expect that the discussion is entirely free from error or oversight.

During the years devoted to this investigation I have profited by the generous assistance of many friends. They have aided me through references, information, copying, verifying, and in other ways. To all these I desire to convey my grateful thanks. In a few instances it is fitting that individual acknowledgment should be made. To Professor William Henry Hudson, of London, I am indebted for the examination of several rare books in the library of the British Museum. Bibliographical help has also been given by Professor Charles Richmond Henderson, of the University of Chicago. Special researches on my behalf have been conducted by Mr. Royall C. Victor and by Miss Lucile Eaves, head resident of the South Park Settlement, San Francisco. I have had the advantage of the expert aid of Mr. David M. Matteson in examining the manuscript records of the colonial and provincial courts of Suffolk and Middlesex counties, Massachusetts. To Professor Nathan Abbott, of Stanford University, Mr. James H. Deering, of the San Francisco Law Library, and Rev. Samuel W. Dike, secretary of the National League for the Protection of the Family, I

am under obligations for information and suggestions. Special thanks are due to Professor Charles Gross, of Harvard, for encouragement in the work and various kind offices; as also to Mr. W. C. Lane and Mr. T. J. Kiernan, of the Harvard Library, for granting the most liberal use of the materials in their charge.

Finally I can but poorly express the gratitude which I owe to my wife, whose patient hand, faithful criticism, and wise counsel have never failed.

CHICAGO, March 19, 1904.

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PART I

ANALYSIS OF THE LITERATURE AND THE THEORIES OF PRIMITIVE MATRIMONIAL INSTITUTIONS

CHAPTER I

THE PATRIARCHAL THEORY

[Bibliographical Note I.—The modern history of the patriarchal theory begins with Filmer's *Patriarchia* (London, 1680), in which the author finds in the Hebrew family a justification of the "divine prerogative" of kings; and the trenchant reply of Locke in *The Two Treatises on Civil Government* (London, 1690), reprinted with Filmer's work in the ninth volume of Morley's *Universal Library*. But the theory is especially associated with the name of Sir Henry Maine. His *Ancient Law* (New York, 1861), aside from its leading hypothesis, is one of the most suggestive books of the century. It was followed by the *Early History of Institutions* (New York, 1875); the *Village Communities* (New York, 1876); and *Early Law and Custom* (New York, 1883). In this last work he contributes supplementary chapters on such topics as "Ancestor-Worship" and "East European House Communities," and he replies to his critics. Maine is criticised by Spencer, *Principles of Sociology* (New York, 1879), Vol. I, Part III, chap. ix; and by McLennan, *Patriarchal Theory* (London, 1885), who, on the negative side, is fairly successful in confuting his adversary. Hearn's *Aryan Household* (London, 1879) and the *Ancient City* (Boston, 1877) of Fustel de Coulanges take practically the same view of primitive society as Maine, while particularly emphasizing ancestor-worship and the genealogical organization.

For the early Aryans and the Hindus see Zimmer's *Alt-indisches Leben* (Berlin, 1879); Delbrück's *Die indogermanischen Verwandtschaftsnamen* (Leipzig, 1885); Schrader's *Sprachvergleichung und Urgeschichte* (Jena, 1883), or the English translation by Jevons (London, 1890); Zmigrodski's *Die Mutter bei den Völkern des arischen Stammes* (Munich, 1886); and especially Leist's epoch-making works, *Graeco-italische Rechtsgeschichte* (Jena, 1884) and the *Alt-arisches Jus Gentium* (Jena, 1889). Of first-rate value also are the *Rechtshistorische und rechtsvergleichende Forschungen* (Part III, on *Indisches Ehe- und Familienrecht*) and the other papers of the indefatigable Kohler. Of these the following are particularly interesting in this connection, all found in the *Zeitschrift für vergleichende Rechtswissenschaft:* "Rechtsverhältnisse auf dem ostind. Archipel u. den westl. Karolinen," *ZVR.*, VI, 344–50; "Gewohnheitsrechte des Pendschabs," *ibid.*, VII, 161–239; "Indische Gewohnheitsrechte," *ibid.*, VIII, 89–147,

262–73; "Gewohnheitsrechte von Bengalen," *ibid.*, IX, 321–60; "Gewohnheitsrechte der Provinz Bombay," *ibid.*, X, 64–142, 161–88; "Gewohnheitsrechte der ind. Nordwestprovinzen," *ibid.*, XI, 161–95; and, for comparison, "Die Ionsage und Vaterrecht," *ibid.*, V, 407–14; "Studien über künstliche Verwandtschaft," *ibid.*, V, 415–40; and "Das Recht der Armenier," *ibid.*, VII, 385–436. As in the last-named paper, the influence of Roman law may be traced in Mégavorian, *Étude ethnographique et juridique sur la famille et le mariage arméniens* (Paris, 1894). Hass, "Die Heirathsgebräuche der alten Inder nach den Grihyasûtra," in Weber's *Indische Studien*, V, 267–412 (Berlin, 1862), reveals in an admirable way the religious spirit pervading the ancient Hindu matrimonial life. This study suggested the excellent monograph of Weber, "Vedische Hochzeitssprüche," *ibid.*, V, 177–266; while the conclusions of both Haas and Weber are ably supported, with the aid of additional sources, by the more elaborate paper of Winternitz, "Das altindische Hochzeitsrituell," in *Denkschriften der kais. Akad. d. Wiss., phil.-hist. Klasse*, XL, 1–113 (Vienna, 1892). In this connection, for comparison, may be read Mackenzie, "An Account of the Marriage Ceremonies of the Hindus and Mahommedans as Practised in the Southern Peninsula of India," in *Transactions of the Royal Asiatic Society*, III (London, 1835); and Lushington, "On the Marriage Rites and Usages of the Jâts of Bharatpur," in *Journal of the Asiatic Society of Bengal*, II, 273–97 (Calcutta, 1833). Especially important are Bernhöft's "Die Grundlagen der Rechtsentwicklung bei den indogermanischen Völkern," in *ZVR.*, II, 253–328; his "Altindisches Familienorganisation," *ibid.*, IX, 1–45; and his "Das Gesetz von Gortyn," *ibid.*, VI, 281–304, 430–40. A popular, but in the main uncritical, book is Clarisse Bader's *La femme dans l'Inde antique* (2d ed., Paris, 1867). Similar in plan and treatment are her *La femme biblique* (new ed., Paris, 1873); *La femme grecque* (2d ed., Paris, 1873); and *La femme romaine* (2d ed., Paris, 1877). A strong defense of the dignified position of the ancient Indic woman, based on the sources, may be found in Jacolliot's *La femme dans l'Inde* (Paris, 1877); and Mary Frances Billington is a vigorous champion of the social status of modern *Woman in India* (London, 1895). See also Pizzi, "Les coutumes nuptiales aux temps héroïques de l'Iran," in *La Muséon*, II, 3 (1883); Vidyasagar, *On Widow-Marriages among the Hindus* (Calcutta, 1855); and Schlagintweit, "Die Hindu-Wittwe in Indien," in *Globus*, XLIII (1883). Among the best technical writings are Mayne's *Hindu Law and Usage* (Madras and London, 1888); Jolly's *Hindu Law of Partition* (Calcutta, 1885); his *Rechtliche Stellung der Frauen bei den alten Indern* (Munich, 1876); Tupper's *Punjab Customary Law* (Calcutta, 1881); and Gooroodass's "The Hindu Law of Marriage and Stridahn," in *Tagore Law Lectures, 1878* (Calcutta, 1879). Max Müller's series of Sacred

Books contains Apastamba, Gautama, Visnu, and the other Sūtras, as well as the later versified law-books of Manu and Yājñavalkya, with other sources of ancient Indic custom. Burnell and Hopkins's *Manu* (London, 1891) is an excellent edition; and Jolly has a German translation of Books VIII and IX in *ZVR.*, III, 232–83; IV, 321–61. For each important point these sources are thoroughly collated in the writings of Kohler, Leist, and Jolly, above referred to.

For the Slavs, Krauss's *Sitte und Brauch der Südslaven* (Vienna, 1885) is the most valuable treatise. See also Turner, *Slavisches Familienrecht* (Strassburg, 1874); and Kovalevsky's *Modern Customs and Ancient Laws of Russia* (London, 1891), in which the author criticises and corrects Sir Henry Maine on important points. For Greece, in addition to Leist's works above mentioned, see the paper of Campaux, *Du mariage à Athènes* (Paris, 1867); that of Moy, "La famille dans Homère," in *Revue des cours littéraires*, 8 mars 1869; Stegeren, *De conditione civili feminarum atheniensium* (Zwallae, 1839); Ouvré, *Observations sur le régime matrimonial au temps d'Homère* (Paris, 1886); Lasaulx, *Zur Geschichte und Philosophie der Ehe bei den Griechen* (Munich, 1852); especially Hruza's *Die Ehebegründung nach attischem Rechte* (Erlangen and Leipzig, 1892); and his *Polygamie und Pellikat nach griechischem Rechte* (Erlangen and Leipzig, 1894).

On the matrimonial institutions of the Romans consult Marquardt's *Privatleben;* Lange's *Römische Alterthümer;* Smith's *Dictionary of Greek and Roman Antiquities;* Müller's *Handbuch;* Bernhöft's *Staat und Recht der rom. Königszeit* (Stuttgart, 1882); Karlowa's *Die Formen der röm. Ehe und Manus* (Bonn, 1868); Rossbach's *Die röm. Ehe* (Stuttgart, 1853); his *Römische Hochzeits- und Ehedenkmäler* (Leipzig, 1871); Laband's "Rechtliche Stellung der Frauen im altröm. und germanischen Recht," in *Zeitschrift für Völkerpsychologie*, III (Berlin, 1865); and Bouchez-Leclercq's *Manuel des inst. romaines* (Paris, 1886). From the mass of writings which are of service for this and the four subsequent chapters may also be mentioned Brissonius, *De ritu nuptiarum* (Paris, 1564); his *De jure connubiorum* (Paris, 1564); Hotman, *De veteri ritu nuptiarum observatio;* his *De sponsalibus;* his *De ritu nuptiarum et jure matrimoniorum*—all published and bound with the two works of Brissonius (Leyden, 1641); Grupen, *De uxore romana* (Hannover, 1727); Ayrer, *De jure connubiorum apud romanos* (Göttingen, 1736); the anonymous *Dei riti delle antiche nozze romane* (Perugia, 1791); Maanen, *De muliere in manu et in tutela* (Lugd. Bat., 1823); Schultz, *De jure succedendi feminarum apud romanos* (Trajecti ad Rhenum, 1826); Chamblain, *De la puissance paternelle chez les romains* (Paris, 1829); Eggers, *Wesen und Eigenthümlichkeiten der altröm. Ehe mit Manus* (Altona, 1833); Mahlmann, *De matrimonii veterum romanorum ineundi* (Halle, 1845); Hase, *De manu juris romani* (Halle, 1847);

Gerlach, *De romanorum connubio* (Halle, 1851); Dubief, *Qualis fuerit familia romana tempore Plauti* (Molini, 1859); Pagés, *La famille romaine* (Toulouse, 1892); Louïse, *Du sénatus-consulte velléien et de l'incapacité de la femme mariée* (Chateau-Thierry, 1873); Bourdin, *De la condition de la mère en droit romain et en droit français* (Paris, 1881); Salomon, *Du mariage du droit des gens et en général des mariages sans connubium* (Paris, 1889); Desminis, *Die Eheschenkung nach röm. und insbesondere nach byzantinischem Recht* (Athens, 1897); and Ciccotti, *Donne e politica negli ultimi anni della republica romana* (Milan, 1895). The criticisms of Kuntze, *Excurse über röm. Recht* (2d ed., Leipzig, 1880), and Esmein, *Mélanges d'histoire du droit et de critique* (Paris, 1886), are of great value on various important questions. Compare also Couch, "Woman in Early Roman Law," in *Harvard Law Review*, VIII (Cambridge, 1895); Picot, *Du mariage romain, chrétien, et français* (Paris, 1849); Monlezun, *Condition civile de la femme mariée à Rome et en France* (Paris, 1878); Tardieu, *De la puissance paternelle en droit romain et en droit français* (Paris, 1875); and Cornil, "Contribution à l'étude de la patria potestas," in *Nouv. rev. hist. de droit*, XXI, 416–85 (Paris, 1897). Gide's excellent *Étude sur la condition privée de la femme* (2d ed., Paris, 1885) deals with the laws of Greece, Rome, and other nations. Poste's edition of Gaius's *Institutionum juris civilis commentarii quatuor* (Oxford, 1875) is an indispensable source; and among legal treatises are particularly to be commended Muirhead's *Introduction to the Private Law of Rome* (Edinburgh, 1886); Puchta's *Institutionen;* Moyle's *Institutionum Libri* (Oxford, 1890); Rein, *Privatrecht* (Leipzig, 1836); and especially Sohm's *Institutes* (Oxford, 1892), by far the best work on the subject for historical purposes, showing the rare insight, clearness of analysis, and vigorous style peculiar to the author. Most readers will find the short *Introduction* of Hadley and the excellent *Outlines* of Professor Morey sufficient. For the general subject of marriage and the family the *Zeitschrift für vergleichende Rechtswissenchaft* (Stuttgart, 1878–96) is indispensable; while the *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* and the *Zeitschrift für Ethnologie* are also of constant service.

For the literature of Arabian and Hebrew matrimonial institutions, respectively, see Bibliographical Notes II and IV.

The student who has not yet seriously attacked the literature of the subject will do well to begin with the following: Tylor, "On a Method of Investigating the Development of Institutions, Applied to Laws of Marriage and Descent," in *Journal of Anth. Inst.*, XVIII, No. 3; Bernhöft's "Zur Geschichte des europäischen Familienrechts," in *ZVR.*, VIII, 1–27, 161–221, 384–405; in connection with his "Principien des europäischen Familienrechts," *ibid.*, IX, 392–444; Friedrichs,

"Familien-Stufen und Eheformen," *ibid.*, X, 189–281; the first two chapters of Posada's *Théories modernes* (Paris, 1896); and the first three chapters of Botsford's *Athenian Constitution* (Boston, 1893), one of the ablest contributions to comparative institutions. This is supplemented by H. E. Seebohm's *Structure of Greek Tribal Society* (London and New York, 1895). For summaries of the results of investigations, from different points of view, Delbrück's "Das Mutterrecht bei den Indogermanen," in *Preussische Jahrbücher*, XCVII, 14–27 (Berlin, 1895), may be compared with Dargun's *Mutterrecht und Vaterrecht* (Leipzig, 1892), containing a criticism of the views of many recent writers.]

IT is the primary purpose of this book to trace the development of the family and marriage in the "three homes" of the English race. An attempt is made to describe the mechanism provided by the state for the administration of matrimonial law; and to appreciate the importance of some of the many problems centering in the family as a social institution. Necessarily a theme so broad may here be treated only in outline. Yet in the outset it is the limitations of the subject which require to be most carefully noted. It is but a part of the wide field of family history which receives special attention. We are closely concerned with the forms of celebration and divorce as they existed among our Teutonic ancestors, and as they have since been molded by custom and legislation in England and the United States. Only in a secondary degree are we interested in the intricate law of the domestic relations. Except incidentally, we are not now called upon to consider the property rights of husband and wife, the laws of guardian and ward, or the rules of kinship and succession.

More pertinent is the general question of the genesis of human marriage and the human family.[1] It will be

[1] "The expression 'human marriage' will probably be regarded by most people as an improper tautology. But, as we shall see, marriage, in the natural-history sense of the term, does not belong exclusively to our own species. No more fundamental difference between man and other animals should be implied in sociological than in biological and psychological terminology. Arbitrary classifications do science much injury."—WESTERMARCK, *History of Human Marriage*, 6. In like spirit, HELLWALD entitles his book *Die menschliche Familie*.

impossible, of course, to examine independently the many difficult problems which have arisen in this connection. Even the specialist may find it hard to trace a clear way through the bewildering maze of existing theory and subtheory. It seems desirable, therefore, by way of introduction, to present as clearly and briefly as may be the more salient results of recent investigation. Marriage is a product of social experience. Hence to understand its modern aspects it is needful to appeal to the general sociological facts surrounding its origin and its early history among the races of mankind. It is necessary to get our bearings. At the dawn of history the Teutonic family was essentially monogamic, originating in a contractual relation. What, then, do we know as to the origin of the monogamic family and regarding the conditions under which marriage by contract arose? Part I will concern itself with the solution of this question.

The literature[1] of primitive marriage and the family is already formidable; and, however contradictory and discouraging, on first examination, its conclusions may appear, there can be little doubt that they demonstrate the possibilities of the comparative method[2] in the domain of social institutions. It is in this field, indeed, that evolutional science bids fair to achieve its most signal triumph. At last, in the laboratory of science, there is some prospect that man may come really to know himself. On the other hand, it is precisely in the study of primitive marriage that the "perils

[1] A brief and clear account of some of the more important works is given by BERNHÖFT, "Zur Geschichte des europäischen Familienrechts," *ZVR.*, VIII, 4 ff., 384 ff. Compare the criticisms of Spencer, Starcke, and Westermarck contained throughout their respective treatises.

[2] For a proof of the efficiency with which the "statistical method" may be applied to anthropological and sociological questions, see the paper of DR. TYLOR "On a Method of Investigating the Development of Institutions, Applied to Laws of Marriage and Descent," *Journal of the Anthropolog. Institute*, Feb., 1889, 245–69. *Cf.* WESTERMARCK, *Human Marriage*, 1–7; STARCKE, *Primitive Family*, 1–16; BERNHÖFT, *op. cit.*, 1–4.

of historical narrative" are most clearly revealed.[1] Nowhere, perhaps, can there be found rasher inference[2] and more sweeping generalization from inadequate data. Too often economic and psychological laws have been slighted; and, in a field where their careful observance is so vitally important, the fundamental principles of organic evolution—such, for instance, as natural selection—have frequently been ignored.[3] A vast mass of interesting facts relating to man's social development, highly important for him to know, has been disclosed. But, with a few notable exceptions, the signal failure of investigators thus far has been the attempt to sustain theories of uniform social progress. The criticism, especially, to which the writings of Bachofen, Maine, Morgan, and McLennan have given rise has greatly weakened the faith of scholars in the doctrine of universal stages of evolution through which all mankind has run.[4]

I. STATEMENT OF THE THEORY

Students of comparative institutions have generally regarded the family as the unit or germ from which the higher forms of social organism have been evolved. A German scholar declares that among all the races of antiquity "the constitution of the family was the basis and prototype

[1] See the suggestive paper of WINSOR, "The Perils of Historical Narrative," *Atlantic Monthly* (Sept., 1890), LXVI, 289–97.

[2] BERNHÖFT, *op. cit.*, 1–4, has noted the danger of inference, especially from written laws, where there has been a mixture of races and institutions: "Denn die Rechtsinstitute sind eben nicht aus einem einheitlichen Prinzip erwachsen, sondern aus einem Kompromiss verschiedener Prinzipien entstanden, welche sich gegenseitig einschränken und durchbrechen."

[3] It is a merit of Westermarck's book that he has "put particular stress upon psychological causes which have often been deplorably overlooked."—*Op. cit.*, 5. *Cf.* also STARCKE, *op. cit.*, 4.

[4] "Yet nothing has been more fatal to the Science of Society than the habit of inferring, without sufficient reasons, from the prevalence of a custom or institution among some savage peoples, that this custom, this institution, is a relic of a stage of development that the whole human race once went through."—WESTERMARCK, *op. cit.*, 2. *Cf.* POST, *Studien zur Entwicklungsgeschichte des Familienrechts*, 1–3, 58.

of the constitution of the state."[1] The same theory is clearly set forth and the process of political expansion carefully described by Plato and also by Aristotle,[2] who base it upon their own observation both among "Hellenes and barbarians," and each illustrates it by reference to the Cyclops of Homer.[3] It is not wholly improbable, as will presently appear, that the family in some form must be accepted as the initial society, possibly among all the races of mankind. At a very early ethnical period the family, so far as it implies great authority, perhaps even the despotic power of the house-father over his wife and children, may often have been "patriarchal." To admit this, however, is very different from accepting as the primordial cell of social development the strictly defined patriarchal family of Sir Henry Maine's *Ancient Law*. In this book, which made its appearance in 1861, we are told that the "effect of the evidence derived from comparative jurisprudence is to establish that view of the primeval condition of the human race which is known as the Patriarchal Theory."[4] The primitive family as thus conceived is substantially the Roman family, not in all respects as it actually appears in the historical period, but as it is thought that it must have been before the process of trans-

[1] MARQUARDT, *Das Privatleben der Römer*, I, 1. The theory is also held by BLUNTSCHLI, *Theory of the State*, 182-89; SCHRADER, *Sprachvergleichung und Urgeschichte*, 391-95; LEIST, *Alt-arisches Jus Gentium*, 113; MÜLLER, *Handbuch der klass. Alterthumswissenschaft*, IV, 18-20; GILBERT, *Handbuch der griech. Staatsalterthümer*, II, 302; MAINE, *Village Communities*, 15 ff.; *Ancient Law*, 118 ff.; *Early Law and Custom*, chap. iii; FUSTEL DE COULANGES, *Ancient City*, 111 ff.; GROTE, *History of Greece*, I, 561; THÜMSER, *Die griech. Staatsalterthümer*, 28 ff.

[2] PLATO, *Laws*, Book III, 680, 681: JOWETT, *Dialogues*, IV, 209; ARISTOTLE, *Politics*, Book I, 2 ff.: JOWETT, I, 2 ff. These are followed by CICERO, *De Officiis*, I, 17.

[3] "They (the Cyclops) have neither assemblies for consultation nor *themistes*, but everyone exercises jurisdiction over his wives and his children, and they pay no regard to one another."—*Odyssey*, Book IX, 106 ff., as rendered by MAINE, *Ancient Law*, 120. *Cf. Odyssey*, Book VI, 5 ff.; BRYANT'S Trans., I, 144, 215, 216. On the *themistes*, as inspired commands of the hero-king, handed down to him from Zeus by Themis, see MAINE, chap. i; and on the import of the passage in Homer compare *ibid.*, 120, with FREEMAN, *Comparative Politics*, 379 n. 20, and BOTSFORD, *Athenian Constitution*, 3, 4.

[4] *Ancient Law*, 118.

formation and decay began. It is a much more extended group than the modern family, embracing under the headship of the eldest valid male parent all agnatic descendants and all persons united to it by adoption, as well as slaves, clients, and other dependents.[1] The power of the house-father is most despotic, though exercised during his entire lifetime over the unmarried daughters and over even the married sons and their wives and children. Thus originally, it is said, the Roman *pater familias* has power of life and death, *vita necisque*, over his children. He may sell them into slavery, and sons, even those who hold the highest offices of state, can originally own no property.[2] The patriarch is king and priest of the household. As a sort of "corporation sole," he is likewise its representative and administrator; for the property is regarded as a part of the family, and on the death of the house-father the family devolves upon the universal successor.[3] A characteristic feature of the patriarchal family is agnation, or the system of tracing kinship through males only.[4] Agnatic relationship "is in truth the connection between members of the

[1] Clients, servants, and even those admitted to the hearth as guests, by observance of the proper rites, were regarded as members of the family group and sharers in the *sacra*. HEARN, *Aryan Household*, 73, 107 f.; FUSTEL DE COULANGES, *Ancient City*, 150; MAINE, *op. cit.*, 156 ff., 185 ff. (*sacra*).

[2] For the Roman *patria potestas* see POSTE, *Gaius*, 61 ff.; LEIST, *Graeco-italische Rechtsgeschichte*, 57–102; SOHM, *Institutes*, 120 ff., 356 ff., 385–95; BERNHÖFT, *Römische Königszeit*, 175 ff.; PUCHTA, *Institutionen*, II, 384 ff.; MOREY, *Outlines of Roman Law*, 23, 24; SCHEURL, *Institutionen*, 271, 272; KUNTZE, *Excurse*, 570 ff.; MAINE, *Ancient Law*, 123 ff., 130 ff., 227, 228; HADLEY, *Roman Law*, 119 ff.; CLARK, *Early Roman Law*, 25; MUIRHEAD, *Hist. Int. to the Private Law of Rome*, 27 ff., 118, 222; LANGE, *Römische Alterthümer*, I, 112 ff.; GEUPEN, *Uxore romana*, 19 ff., 37 ff.; BADER, *La femme romaine*, 75 ff.; TARDIEU, *Puissance paternelle*, 5 ff.; BOURDIN, *Condition de la mère*, 9 ff. On the power of the father to expose female infants during the early empire see CAPES, *Age of the Antonines*, 19 f.

[3] MAINE, *Ancient Law*, 122, and chap. vi.

[4] On the Roman agnation see POSTE, *Gaius*, 113 ff.; LEIST, *Graeco-italische Rechtsgeschichte*, 64 ff.; SOHM, *Institutes*, 124, 355 ff.; PUCHTA, *Institutionen*, II, 17 ff.; MOYLE, *Institutiones*, I, 155, 156; MOREY, *op. cit.*, 6, 34; KUNTZE, *Excurse*, 435–37 (*Agnationsverband*); LANGE, *Römische Alterthümer*, I, 211 ff.; MUIRHEAD, *Hist. Int. to the Private Law of Rome*, 43 ff., 122 ff.; HADLEY, *Roman Law*, 130 ff.; MAINE, *op. cit.*, 56 141 ff.

family, conceived as it was in the most ancient times."[1] Its foundation is "not the marriage of father and mother, but the authority of the father. . . . . In truth, in the primitive view, relationship is exactly limited by *patria potestas.* Where the *potestas* begins, kinship begins; and therefore adoptive relatives are among the kindred. Where the *potestas* ends, kinship ends; so that a son emancipated by his father loses all rights of agnation. And here we have the reason why the descendants of females are outside the limits of archaic kinship." Indeed "it is obvious that the organization of primitive societies would have been confounded, if men had called themselves relatives of their mother's relatives."[2] The basis of the patriarchal family is the *patria potestas*, but in its "normal shape" it has not been and could not be "generally a durable institution."[3] Yet its former universality may be inferred from certain derivative institutions, such as the perpetual tutelage of women, the guardianship of minors, the relation of master and slave, and especially from agnation which is found "almost everywhere" and is "as it were a mould" retaining the imprint of the paternal powers after they have ceased to exist.[4] Applying this test chiefly, Maine finds evidence of the existence of the *potestas* among the Hebrews as well as all the peoples of the Aryan stock; and he believes that it would be hard to say "of what races of men it is *not* allowable to lay down that the society in which they are united was originally organized on the patriarchal model."[5]

The patriarchal family as thus constituted is the "type of an archaic society in all the modifications which it was capable of assuming." From it as in concentric circles have been successively evolved all the higher forms of political organization. Everywhere, as at Rome, "the aggrega-

[1] MAINE, *op. cit.*, 142. [2] *Ibid.*, 144. [3] *Ibid.*, 141.
[4] *Ibid.*, 141 ff., 145 ff. [5] *Ibid.*, 118 ff., *passim.*

tion of families forms the gens or house. The aggregation of houses makes the tribe. The aggregation of tribes constitutes the commonwealth."[1] The state is therefore the result of the expansion of its primordial cell;[2] and the genealogical organization of society precedes and overlaps the territorial. All these groups, lower and higher, regard themselves as united by the bond of kinship. But, as a matter of fact, the kinship is often assumed; and the heterogeneity of blood is explained as the result of the fiction of adoption by which relationship is artificially extended and strangers are admitted to the *sacra*. Without this fiction, says Maine, "I do not see how any one of the primitive groups, whatever were their nature, could have absorbed another, or on what terms any two of them could have combined, except those of absolute superiority on one side and absolute subjection on the other." Society could hardly have escaped from its "swaddling clothes."[3] Furthermore, a strong motive for the artificial extension of the family is derived from the worship of ancestors. The earnest desire of the ancients for male issue to perpetuate the family rites has tended to foster adoption, and it probably accounts for the levirate and other similar expedients to provide an heir.[4]

[1] *Ibid.*, 123, 124, 128. See the table of comparative groups in SCHRADER, *Sprachvergleichung und Urgeschichte*, 394. For the Ionic groups *cf.* SCHÖMANN, *Antiquities*, 317, 364; *Athenian Constitution*, 3–10; WACHSMUTH, *Hist. Ant.*, I, 342 f.; MÜLLER, *Handbuch*, IV, 17–22; GROTE, *Hist. of Greece*, III, 52, 53. In general, *cf.* FUSTEL DE COULANGES, *Ancient City*, 141 ff.; HEARN, *Aryan Household*, 63 ff., 112 ff., *passim*; LEIST, *Graeco-italische Rechtsgeschichte* and *Alt-arisches Jus Gentium*.

[2] For FREEMAN'S well-known theory of political expansion see *Comparative Politics*, chap. iii.

[3] MAINE, *Ancient Law*, 125 ff., 26. On the new mode of adoption in India see MAYNE, *Hindu Law and Usage*, 88 ff.; LYALL, *Asiatic Studies*, chap. vii; *Fortnightly Review*, Jan., 1877; JOLLY, *Hindu Law of Partition*, 144–66. On the formation of non-genealogical clans see HEARN, *Aryan Household*, 296 ff. *Cf.* POST'S discussion of "Künstliche Verwandtschaft" in *Studien zur Entwicklungsgeschichte des Familienrechts*, 25–42: KOHLER, *ZVR.*, V, 415–40.

[4] MAINE, *Early Law and Custom*, chaps. iii, iv, viii. For ancestor-worship see especially FUSTEL DE COULANGES, *Ancient City*, 9–52; HEARN, *Aryan Household*, 15 ff., 45, 46, 59, 60; TAYLOR, *Primitive Culture*, II ("Animism"); MAYNE, *Hindu Law and Usage*, 55, 438; LYALL, *Asiatic Studies*, chap. ii; DURUY, *Hist. of*

II. CRITICISM OF THE THEORY BY SPENCER AND McLENNAN

The patriarchal family of the *Ancient Law*, whose leading features have now been presented, reappears with slight modification in the later writings of Sir Henry Maine.[1] It has been widely accepted. Yet it was inevitable that a theory which on its face appears to neglect many of the most remarkable facts everywhere observable in the social life of primitive men[2] should arouse most serious doubt. Nor will it do, with Starcke,[3] to excuse the author on the ground that his conclusions are intended to be true only for the domain of the law-books, of comparative jurisprudence; for obviously his language will not bear that construction.

Herbert Spencer was the first writer to subject Maine's hypothesis to a luminous criticism.[4] First he points out that Maine has not been entirely guiltless of "the lofty contempt" entertained by civilized peoples for their barbarous neighbors, which he himself censures as a serious error. For he "has

Rome, I, 206; ZIMMER, *Altindisches Leben*, 413; BOTSFORD, *Athenian Constitution*, 24, 25, *passim*, who holds against SCHRADER, *Sprachvergleichung* (2d ed.), 613–15, that ancestor-worship arose before the separation of the Aryan races. FUSTEL DE COULANGES, *Ancient City*, 49–51, and HEARN regard the religious tie as of more importance than the blood-bond in the formation of the gentile groups, *Aryan Household*, 66; and LEIST, *Graeco-italische Rechtsgeschichte*, 7 ff., 11 ff., also makes the formation of the first recognized groups of relationship depend on the *sacra*. *Cf.* KOHLER, in *ZVR.*, VI, 409–17, for animism; and for additional references, a subsequent note.

[1] *Early Hist. of Institutions*, 64 ff., 115 ff., 217 ff., 306–41; *Village Communities*, 15, 16, *passim*; *Early Law and Custom*, chaps. iii, iv, and especially chaps. vii, viii, where adverse criticism is considered. *Cf.* McLENNAN, *Patriarchal Theory*, 1–23, for a collation of the more important passages of Maine's writings.

[2] "The rudiments of the social state, so far as they are known to us at all, are known through testimony of three sorts—accounts by contemporary observers of civilization less advanced than their own, the records which particular races have preserved concerning their primitive history, and ancient law." Of these three sources of information, Maine regards ancient law as the best. He fails entirely to appreciate the true importance of the first source, from which, obviously, are derived most of the data of recent ethnical, anthropological, and sociological investigation, including much that Maine himself has presented. *Cf.* the criticisms by SPENCER, *Principles of Sociology*, I, 713, 714; LUBBOCK, *Origin of Civilization*, 6 ff.; McLENNAN, *Patriarchal Theory*, 29, 30.

[3] *Primitive Family*, 94, 95.

[4] *Principles of Sociology*, I, 713–37.

practically disregarded the great mass of the uncivilized" peoples, and "ignored the vast array of facts they present at variance with his theory." Nor, in favor of a primitive patriarchal state, is it safe to assume that "the implicit obedience of rude men to their parents is doubtless a primary fact." For, "though among lower races, sons, while young, may be subordinate, from lack of ability to resist; yet that they remain subordinate when they become men cannot be assumed as a uniform, and therefore as a primary, fact." This objection is sustained by reference to many savage and barbarous tribes among which parents exercise little or no control over the children. Again, it is by no means established that "the history of political ideas begins, in fact, with the assumption that kinship in blood is the sole possible ground of community in political functions." On the contrary, "political co-operation arises from the conflicts of social groups with one another;"[1] and though it may be facilitated by a feeling of common descent, examples of political combination may be produced in which relationship is not considered. Furthermore, it is hard to conceive how so advanced a conception of government as is implied by the *patria potestas* could exist in the "infancy of society;" nor has it yet been proved that in the primitive state the individual is entirely lost in the family group, which holds all property in common. Instances of "personal monopoly" of property among low races are not wanting. Finally the assumption that in the primordial state women remained in perpetual tutelage is without foundation; how far it is from the truth will be made clear in future chapters.[2]

But the patriarchal theory has been vigorously attacked in its very strongholds, the laws of the Hebrews and the

[1] *Ibid.*, 716, 717, 540-53.

[2] See below, chap. iv. MR. SPENCER also points out that Maine does not take into account "stages in human progress earlier than the pastoral or agricultural." — *Op. cit.*, I, 724 ff.

primitive customs of the Indo-Germanic peoples. The well-known polemic of the late J. F. McLennan is of special interest in this connection.[1] Among none of the Aryan races, the Romans only excepted, does he find the *patria potestas* or the strict rule of agnation; while among them all, he believes, abundant evidence of original promiscuity and of the maternal system of kinship is disclosed. Even the Hebrew Scriptures, where Maine perceives "the chief lineaments" of the patriarchal society,[2] so far from revealing the *patria potestas* and agnation, bear witness to "beena"[3] marriage and the recognition of kinship in the female line.[4] Sir Henry Maine in this connection refers incidentally to Sir Robert Filmer in whose *Patriarchia* the existence of the *patria potestas* among the ancient Hebrews is alleged. But, as McLennan justly observes, "to those who have studied the controversy between Locke and

[1] *The Patriarchal Theory*, edited and completed by DONALD MCLENNAN (London, 1885).

[2] *Ancient Law*, 118–20, 123.

[3] The marriage of Jacob with Laban's daughters is the case in point. In "beena" marriage—the name given to the institution in Ceylon—"the young husband leaves the family of his birth and passes into the family of his wife, and to that he belongs as long as the marriage subsists. The children born to him belong, not to him, but to the family of their mother. Living with, he works for, the family of his wife; and he commonly gains his footing in it by service. His marriage involves usually a change of village; nearly always (where the tribal system is in force) a change of tribe—so that, as used to happen in New Zealand, he may be bound even to take part in war against those of his father's house; but always a change of family. The man leaves father and mother as completely as, with the patriarchal family prevailing, a bride would do; and he leaves them to live with his wife and her family. That this accords with the passage in Genesis will not be disputed." *Patriarchal Theory*, 42, 43. Nevertheless, in this case McLennan is certainly mistaken. We have here to do with that form of wife-purchase called "marriage by service;" see LICHTSCHEIN, *Die Ehe*, 10, 11; the argument of WAKE, *Marriage and Kinship*, 239–44; and FRIEDRICHS, "*Familienstufen und Eheformen*, *ZVR.*, X, 207, 208. "Beena" marriage existed, however, among other Semitic peoples and possibly also among the Hebrews: Smith, *Kinship and Marriage*, 108, 175–78, 146. It is found also in Africa and in many other places: WAKE, *op. cit.*, 149, 299–301; MCLENNAN, *op. cit.*, 43; WESTERMARCK, *Human Marriage*, 109, 339–90; TYLOR, *On a Method of Investigating Institutions*, 246 ff.; STARCKE, *op. cit.*, 78; HELLWALD, *Die mensch. Familie*, 255, 266.

[4] On the Hebrew family see *Patriarchal Theory*, 35–50, 132, 133, 243–47, 273, 274 note, 289, 306, 307, 315, *passim*.

Filmer[1] it may seem wonderful that the truth of Filmer's main position could be thus lightly assumed by anyone, and especially by any lawyer, who had read Locke's masterly reply to the pleadings of his opponent."[2] The principal conclusions of McLennan are sustained in a striking way, for a sister-branch of the Semitic race, by the researches of Wilken and Robertson Smith into the marriage customs of early Arabia.[3] The ancient Hebrews did not have agnation; yet they "traced descent from the father for the purposes of what we may call rank, or a feeling of *caste*," and this was the source of paternal power.[4] The house-father exercised a high degree of authority over his wives and children, but he can scarcely be regarded as a patriarch in the strict sense of the term.[5]

[1] FILMER'S *Patriarchia, or the Natural Power of Kings* appeared in 1680; LOCKE'S *Two Treatises on Government*, in 1690. Both works are reprinted in the ninth number of MORLEY'S *Universal Library*.

[2] See *Patriarchal Theory*, 36 ff., 243 ff., 273 note, where a summary of Locke's argument, with additional evidence against the existence of agnation and *patria potestas* and in favor of an original maternal system among the Hebrews, will be found.

[3] ROBERTSON SMITH, *Kinship and Marriage*; WILKEN, *Das Matriarchat bei den alten Arabern*, a work suggested by SMITH'S "Animal Worship and Animal Tribes," *Journal of Philology*, IX, 75-100. These writers have found among these Semitic tribes the system of kinship through the mother in actual use, with traces of polyandry, exogamy, and the totem *gens;* and Wilken believes that he finds evidences of early promiscuity. See especially KOHLER, *Ueber das vorislamitische Recht der Araber*, *ZVR.*, VIII, 238-61; and FRIEDRICHS, *Das Eherecht des Islam*, *ibid.*, VII, 240-84, especially 255 ff., who shows that the Mohammedan house-father exercises great authority over his wife, yet she has her own property and receives a dower. At present, relationship in Arabia is generally counted in the male line; and therefore, WESTERMARCK, *Human Marriage*, 102, note 4, regards the conclusion of Smith that originally the system of female kinship exclusively prevailed as "a mere hypothesis."

[4] WAKE, *Marriage and Kinship*, 244.

[5] According to EWALD the ancient Hebrew father might "sell his child to relieve his own distress, or offer it to a creditor as a pledge."—*The Antiquities of Israel* (London, 1876), 190; WESTERMARCK, *op. cit.*, 228; and the Levitical law prescribes death as the penalty for striking a parent (Leviticus 20:9; Exodus 21:15, 17); but the penalty could only be administered through appeal to the whole community, WESTERMARCK, *op. cit.*, 228. *Cf.* MICHAELIS, *Commentaries on the Laws of Moses*, I, 444, who shows that the mother, as well as the father, might sometimes choose wives for the sons; while McLennan and Locke prove that the position of the mother in Israel was higher than is consistent with Roman patriarchalism.

III. THE THEORY IN THE LIGHT OF RECENT RESEARCH

Let us now see somewhat more in detail what light is thrown by recent investigation on the controversy between Maine and McLennan. Westermarck has taken great pains to enumerate the uncivilized peoples, chiefly non-Aryan, among whom descent and usually inheritance follow the paternal side;[1] and he finds that the number is "scarcely less" than the number of those among whom the female line is exclusively recognized. But in many of these cases it seems probable that the parental rather than the agnatic system prevails, though the male line may take precedence. In some instances rank or authority descends from father to son, while in other respects the female line predominates. Doubtless more frequently than is usually imagined a mixed system rather than a strictly paternal or a strictly maternal system would be found to exist.[2] As the result of his inquiry, Westermarck rejects the hypothesis that kinship through the mother is a primitive and universal stage, though he does not substitute the agnatic theory in its place. Starcke, on the other hand, after an extended examination of the customs of rude races, especially in America and Australia, suggests that the paternal as a general rule probably preceded the maternal system which arose only with the development of the gentile organization.[3] But Starcke's evidence can scarcely be accepted as convincing.

Similar difficulties are presented by the question of the prevalence of the so-called patriarchal power among non-

[1] *Human Marriage*, 97–104, notes. *Cf.* FRIEDRICHS, "Ueber den Ursprung des Matriarchats," *ZVR.*, VIII, 371–73; KOHLER, *ibid.*, VI, 403 (Korea); VII, 373 (Papuas).

[2] Compare WAKE, *Marriage and Kinship*, 267 ff., 362 ff., 382, 396 ff.; especially FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 209–12; and DARGUN, *Mutterrecht und Vaterrecht*, 3, 28, 118, who believes the so-called "mixed systems" are merely a consistent union of two entirely different principles—the principle of relationship with the principle of power or protection.

[3] STARCKE, *op. cit.*, 26, 27 (Australia), 30 (America), 58 ff., 101 ff. Compare the criticism of HELLWALD, *Die mensch. Familie*, 456 ff.; and on the development of the patriarchal family, see LIPPERT, *Kulturgeschichte*, II, 505–54.

Aryan races. Many apparent examples of despotic authority can be enumerated;[1] but it is often hard to determine whether, as in the cases of the Arabs and Hebrews, we have to do merely with a high degree of power on the part of the house-father or with a genuine *patria potestas* of the Roman type. Naturally, as Westermarck suggests, the father's authority among savages "depends exclusively, or chiefly, upon his superior strength;"[2] while anything like a patriarchal "system" can only arise later under the influence of ancestor-worship and more developed social and industrial conditions. Where authority depends solely or mainly upon brute force, it is evident that a very protracted patriarchal despotism over the sons is hard to conceive. Moreover, much error has doubtless arisen through falsely assuming that paternal authority and mother-right are incompatible; whereas they may well coexist, as will presently appear.

For the Indo-Germanic or Aryan peoples the investigations of Zimmer, Schrader, Delbrück, Kohler, and especially the researches of Leist, enable us to speak with a higher degree of confidence, though only for the period covered by positive linguistic and legal evidence. Bachofen, McLennan, and after them many other writers,[3] as will later be shown, have maintained that among all branches of the Aryan stock conclusive proofs exist of a former matriarchate, or, at any rate, of exclusive succession in the female line. But this

[1] WESTERMARCK, *op. cit.*, 224-35, gives an enumeration. Noteworthy examples of patriarchal power are afforded by the ancient Peruvians and Mexicans, and by the modern Chinese and Japanese. On the Nahua and Maya natives see BANCROFT, *Native Races*, II, 247-53, 663-68. *Cf.* KOHLER, "Das Recht der Azteken," *ZVR.*, XI, 54, 55; also *ibid.*, VI, 374 (Chinese), 333, 334; VII, 373 (Papuas).

[2] *Op. cit.*, 225.

[3] BACHOFEN, *Das Mutterrecht;* MCLENNAN, *Studies*, I, 121 ff., 195 ff.; *idem*, *Patriarchal Theory*, 50 ff., 71 ff., 96 ff., 120 ff., 250 ff.; DARGUN, *Mutterrecht und Raubehe*, 8, 13, *passim;* GIRAUD-TEULON, *Les origines du mariage*, 130 ff., 286 ff., 329 ff.; *idem*, *La mère chez certaines peuples de l'antiquité;* LIPPERT, *Geschichte der Familie*, 4 ff.; LUBBOCK, *Origin of Civilization*, 153, 154. KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 393 ff., holds that the primitive Aryans must necessarily have recognized relationship through the mother. For the literature of this subject see the next chapter.

view is decidedly rejected, if not entirely overthrown, by the philologists, and depends for its support on the presence in later institutions of alleged survivals. The judgment of Delbrück must probably be accepted as decisive for the present state of linguistic, if not of all scientific, inquiry. He declares that "no sure traces of a former maternal family among the Indo-Germanic peoples have been produced."[1] Similar conclusions are reached by Schrader, Max Müller, and Leist.[2] Also, among the institutional writers, Wake declares that "primitively among the peoples belonging to the wide-spread Aryan or Indo-European stock, while relationship was acknowledged through both parents, descent was traced preferably in the male line;"[3] and Bernhöft, constrained through the evidence presented by Schrader and Delbrück, believes that it is now placed "beyond question that the primitive Aryans did not live according to mother-right," but were united in family groups resembling the south Slavonian house communities.[4] On the other hand, Dargun, the foremost defender of the theory of mother-right, thinks that Bernhöft has "capitulated" too easily.[5] In his

[1] DELBRÜCK, "Das Mutterrecht bei den Indogermanen," *Preussiche Jahrbücher*, XCVI, 14-27, a clear summary of the results of recent research. *Cf.* his *Die Indogermanischen Verwandtschaftsnamen* (Leipzig, 1889). According to HELLWALD, *Die mensch. Familie*, 453-80, especially 459, 460, patriarchalism was fully established at the earliest dawn of Indic history; but there are nevertheless traces of earlier mother-right.

[2] SCHRADER, *Sprachvergleichung und Urgeschichte* (2d ed.), 536 ff.; JEVONS's Translation, 369 ff.; LEIST, *Alt-arisches Jus Gentium*, 51-58. MAX MÜLLER declares that "whether in unknown times the Aryas ever passed through that metrocratic stage in which the children and all family property belong to the mother, and fathers have no recognized position whatever in the family, we can neither assert nor deny."—*Biographies of Words*, xvii.

[3] WAKE, *Marriage and Kinship*, 359 ff., especially 382, where a thorough and detailed criticism of McLennan's theory is given.

[4] BERNHÖFT, "Die Principien des eur. Familienrechts," *ZVR.*, IX, 418, 419, 437 ff. See also his *Römische Königszeit*, 202 ff.; and his articles in *ZVR.*, VIII, 11; IV. 227 ff.; and compare DARGUN, *Mutterrecht und Vaterrecht*, 91-94, 108. STARCKE, *op. cit.*, 101-18, also gives a searching examination of the theory of McLennan and the earlier views of Dargun, rejecting their conclusions.

[5] *Mutterrecht und Vaterrecht*, 108.

last monograph, entitled *Mutterrecht und Vaterrecht*, he maintains essentially the conclusion of his *Mutterrecht und Raubehe*, that before their separation the Aryan people had developed the system of kinship "through the mother as the only or chief basis of blood-relationship" and had "subordinated their entire family law to this principle."[1] But the later treatise contains a very important modification, or perhaps, more justly speaking, extension, of the author's theory. Setting aside as still an open question the general prevalence of promiscuity or sexual communism at the very dawn of distinctively human life, Dargun conceives that, before any system of kinship, maternal or agnatic, became recognized as a principle of customary family law, there must have existed a family, or rather parent-group (*Elterngruppe*), in which the father was protector and master of the mother and her children. This parent-group is the "hypothetical primordial cell of the family," brought together by sexual requirements and the need of sustenance and protection. It is "structureless, devoid of any firm bond, since it rests neither upon the principle of relationship nor that of legalized power." Its resemblance to the patriarchal family, though misleading, "is not without significance." For it "forms the necessary stage of an evolution which in analogous manner is also passed through by property. Inductively it is still demonstrable that individualism and atomism, not communism, as is usually assumed, are the starting point of evolution."[2] As a general rule, according to Dargun, the structureless parent-group is superseded by the maternal family, whose basis is mother-right, or the exclusive legal recognition of blood-relationship in the female line. Only in rare cases does the patriarchal agnatic family follow

[1] DARGUN, *Mutterrecht und Raubehe*, 13. *Cf.* the *Mutterrecht und Vaterrecht*, 95, 117 ff., *passim*.

[2] DARGUN, *Mutterrecht und Vaterrecht*, 41, 42, 4 ff., 28, 29–42, 118, *passim*.

immediately upon the primitive group, without prior development of mother-right;[1] and hence, under exceptional conditions hindering the rise of the maternal system, do we find a form of the family in which, from a very early period, the house-father is the source of authority, practical or legalized.

Aside from his theory of evolution, in his principal thesis, which he fairly sustains by powerful argument, Dargun has rendered to science a distinct service. It is, he insists, highly necessary carefully to distinguish between *power* and *relationship*. "Mother-right" does not involve "maternal power" or the matriarchate, though sometimes actually united with it; nor does the headship of the house-father as provider, protector, and master imply agnation, the so-called "father-right." There is no contrast between power and relationship. "Mother-right in the sense of exclusive maternal kinship is compatible with a patriarchate just as exclusive." They may, and often do, coexist. It follows that the presence of the maternal system of kinship does not imply the existence of maternal power; just as it does not imply the non-existence of paternal authority. The distinction between power and kinship is justly declared to be an "indispensable key" for the solution of the greatest difficulties arising in this branch of sociological science, the disregard of which has often vitiated or confused the argument even of the foremost investigators.[2] With the aid of his key Dargun examines the linguistic evidence, which he finds favorable to the existence of mother-right among all the Aryan peoples after the separation, though united with a real supremacy of the house-father;[3] and he protests vigor-

[1] DARGUN, *op. cit.*, 41.

[2] *Ibid.*, 3 ff., 28, 36, 86 ff., 155, *passim*. As remarked in the text, the whole work is concerned with the thesis in question. The distinction is also made in the *Mutterrecht und Raubehe*, 18.

[3] See *Mutterrecht und Vaterrecht*, 86–116, for his criticism of the linguistic argument.

ously against the tendency, even on the part of Leist, to confound old Indic with old Aryan law; for the "Indians of the Vedas are in many respects more advanced than the Germans a thousand or the Slavs two thousand years later."[1] Valuable as the criticism of Dargun undoubtedly is, notably his distinction between power and relationship, it can scarcely be admitted that he has done more than reopen the question of the existence at any time of mother-right among the Aryans. His results are negative. He has not shifted the burden of proof; while his argument tends to confirm the view of the philologists that from the primitive stage the Aryan father was head of the household.[2]

But the patriarchal theory, strictly considered, fares little better than the maternal at the hands of recent investigators. Leist, who has been able with wonderful completeness to reconstruct the juridical life of the early household, though largely on the basis of old Indic sources, declares positively that "the Aryan people has not within itself a single element of patriarchalism."[3] This statement, as Bernhöft observes,[4] is perhaps too sweeping, even when

[1] *Ibid.*, 91, 92. *Cf.* a similar protest against conclusions as to the primitive Aryans derived from Greek and Roman sources, *ibid.*, 116; and *Mutterrecht und Raubehe*, 14.

[2] *Mutterrecht und Vaterrecht*, 69, denies that women have ever attained political headship; but (113, 114) declares, though the researches of the philologists make it probable that the Aryans lived under the rule of house-fathers, that neither this fact nor any other circumstance tells against the view that mother-right coexisted from antiquity; while, in a still more remote period, this may have implied matriarchal power in the family; but of such a matriarchate no proofs are presented.

[3] LEIST, *Graeco-italische Rechtsgeschichte*, 64. This work is continued in the *Alt-arisches Jus Gentium*, the two books really constituting a single treatise. Compare the more conservative view of JOLLY, *Ueber die rechtliche Stellung der Frau*, 4 ff., 20–22, and *Hindu Law of Partition*, 76 ff., who, however, denies the existence of an authority on the part of the Hindu husband equal to that of the Roman *pater*.

[4] BERNHÖFT, "Zur Geschichte des eur. Familienrechts," *ZVR.*, VIII, 12, 15, who also regards the view of DARGUN, *Mutterrecht und Raubehe*, 8, 13, as extreme. *Cf.* his "Principien des eur. Familienrechts," *ZVR.*, IX, 416, n. 39. KOHLER favors the patriarchal system and agnation for the Indic peoples, in *ZVR.*, VII, 201, 210, 216; X, 85. HEARN, *Aryan Household*, chaps. iii–vi, *passim*, takes practically the same view as Maine regarding the patriarchal theory, rejecting entirely for the Aryans the matriarchal hypothesis.

tested by the results of Leist's own researches; but the patriarchal family of Sir Henry Maine does not appear. The evolution of juridical conceptions among the old Aryans, according to Leist, presents two general phases. First is the *rita* stage, or period of fixed, divinely appointed order, of natural law, corresponding to the Greek *cosmos* or *phusis* and the Latin *ratum* or *ratio naturalis*. In this "natural *history*" or pantheistic stage there is at first little idea of law as something to be separately contemplated. Under *rita* is comprehended the unchangeable order observable in the material world as well as in the physical and social life of man; but the universe and the creative energy, the All and Varuna, are identified or blended in thought.[1] Only slowly are these concepts differentiated and the immutable order of nature becomes looked upon as *dhama*, or a holy ordinance established by Varuna, who now appears as a protecting and creative spirit.

Dhama thus forms a means of transition to the second juridical phase, that of *dharma*, or divine law, corresponding to the Greek *themis* and the Latin *fas*.[2] In the *dharma* period, law is regarded as inspired by the gods, whose earthly agent, the priest or hero-king, is intrusted with its application; and

[1] The *rita*-conception is well expressed by DR. BOTSFORD: "This mankind learned from the revolution of sun and stars, from the succession of the seasons, from the unchanging movements of nature. The conception thus gained was transferred to human modes of activity. The sexes in marriage were subject to the *naturalis ratio*, as well as the continuance of the race through successive generations. The relation of parents to children with their reciprocal obligations and privileges—the protection and support which the father, as the stronger, offered, the kind care of the mother for her infants, the reverence and affection with which the children requited their services, the love of youth and maiden, leading to marriage—all these rested, in the *rita* period, on the one foundation of natural law."—*Athenian Constitution*, 29, 30.

[2] The discussion of the two general phases of *rita* and *dharma*, with their transitional stages, constitutes one of the most valuable parts of LEIST'S contribution to comparative jurisprudence: *Alt-arisches Jus Gentium*, 3, 111 ff., 132, 133, 174 ff., 606; *Graeco-italische Rechtsgeschichte*, 175–285. *Cf.* BOTSFORD, *op. cit.*, 24, 25, 26 ff., for an excellent account; on the Roman stages see MUIRHEAD, *Private Law of Rome*, 14–23; and for the Greek *themis* and the *themistes* of the hero-kings consult MAINE, *Ancient Law*, chap. i.

in it the rules governing civil and public conduct, according to modern conceptions, are not distinguished from those relating to manners, morality, or religion. When history dawns, our early Aryan ancestors had already entered the *dharma* phase of evolution; and even now the Hindus have scarcely gained the third phase, prevailing in the civilized West, in which the element of "civil law" is separate from all other ingredients.[1]

Of the family relations of our primitive ancestors in the *rita* period we know little, except through inference or analogy. The so-called "natural forms" of marriage by purchase and capture were doubtless practiced, but probably not exclusively; and these customs were handed down to the second period, though they were modified to bring them into harmony with the higher ethical and social ideas which had then gained predominance.[2] Whether or not the absolute power of the father and the strict rule of agnation prevailed it would be as difficult to affirm as to deny.[3] In the *dharma* period the ancient *rita* conception of marriage as an ordinance of nature, whose real purpose is to provide posterity, is still retained; but it gains a social character.[4] The central principle of the Aryan household is the Hestia-Vesta cult, or the worship of the sacred hearth. To gain the protection of the ancestral gods the hearth-fire must be kept always

[1] For a definition of *dharma* see BERNHÖFT, "Ueber die Grundlagen der Rechtsentwicklung bei den indogermanischen Völkern," *ZVR.*, II, 266 ff., 261 ff.

[2] LEIST, *Alt-arisches Jus Gentium*, 122 ff., 125–33.

[3] BOTSFORD, *Athenian Constitution*, 10 ff., 21 ff., 25 ff., divides the *rita* period into two stages: that of the "primitive Aryan household," and that of the "early Aryan household," and thinks that the latter stage is represented by the house-communities of the southern Slavs; but this may be doubted. Dr. Botsford favors the existence of agnation and the absolute power of the father in the *rita* period; and believes that the liberal tendencies, presently to be pointed out, are a development of the *dharma* period, beginning before the separation (24–26). On agnation and the power of the early Aryan house-fathers see SCHRADER, *Sprachvergleichung und Urgeschichte*, 386 ff.; ZIMMER, *Altindisches Leben*, 319 ff., 326 ff.; DELBRÜCK, *Die indogermanischen Vervandtschaftsnamen*, 382, 586–88, 543, 544; JOLLY, *Ueber die rechtliche Stellung*, etc., 4 ff., 20–22; *Hindu Law of Partition*, 76 ff.

[4] LEIST, *op. cit.*, 80.

burning; and the care of the family *sacra* is the special function of the house-father, who is lord and priest of the family. But the house-mother holds a worthy position in the domestic worship. From the first kindling of the hearth-fire at the nuptials, she appears as co-priestess and helper of her husband in the sacred rites. The whole life-partnership of the wedded pair is shaped and dominated by lofty religious motives. The Aryan housewife is not the chattel of her husband; she is a free woman and shares in his highest sacred functions. The primary purpose of the union is the birth of a legitimate son to perpetuate the paternal line and to foster the ancestral cult.[1] So paramount is this motive that, in case no son is born in wedlock, resort may be had to adoption, or to analogous expedients for the fictitious extension of fatherhood. For among the Aryans, as Maine suggests, the fiction of adoption is of the highest legal importance; and, indeed, very widely among the races of mankind it has served a useful purpose in social progress.[2]

[1] On ancestor-worship, in connection with the literature already cited, p. 13, note 4, see LEIST, *Graeco-italische Rechtsgeschichte*, 7 ff., 121 ff.; *Alt-arisches Jus Gentium*, 59-118; ZIMMER, *Altindisches Leben*, 318; SCHNEIDER, *Die Naturvölker*, I, 202 ff., II, 64 f., 75, 76, 108, 126 f., 255 ff., 369; KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 408 ff.; "Studien über künstliche Verwandtschaft," *ibid.*, V, 423-25; also for the Papuas, *ibid.*, VII, 373. For the influence of ancestor-worship among the Slavs see KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, 33 ff.; among the American aborigines, PEET, "Ethnographic Religions and Ancestor-Worship," *Am. Antiquarian*, XV, 230-45, and "Personal Divinities and Culture Heroes," *ibid.*, 348-72.

[2] MCLENNAN, *Patriarchal Theory*, 10-14, 275 ff., 282, 284, 294, criticises Maine's theory of adoption. Kohler's investigations show that adoption, artificial brotherhood, milk-kinship, and like institutions have widely prevailed and rendered important service. Adoption, he holds, may arise in different motives; sometimes being due to sexual communism, when it is a means of assigning the children to particular fathers; but very generally arising in the desire for descendants to perpetuate the family-worship: "Studien über die künstliche Verwandtschaft," *ZVR.*, V, 415-40; see also for much important matter his various other writings in *ZVR.*, III, 408-24, 393 ff. (India); VI, 190 (Chins), 345 (Indian Archipelago), 377-79 (China), 403 (Korea); VII, 218 ff. (Punjab); VIII, 100 (Rajputs), 109-12 (Dekkan), 243, 244 (Arabia). See also POST, *Familienrecht*, 25-42, for an interesting account; also MAYNE, *Hindu Law and Usage*, 60 ff., 77, 99-207; LEIST, *Alt-arisches Jus Gentium*, 103 ff., 115, 606; TORNAUW, "Das Erbrecht nach den Verordnungen des Islams," *ZVR.*, V, 151; FRIEDRICHS, "Familienstufen und Eheformen," *ibid.*, X, 237-45; STARCKE, *Primitive Family*, 146, 233; HUC, *Chinese Empire*, II, 226.

Here also the Aryan wife appears as co-priestess with her husband. Each is regarded as having a share in the begetting of the child, and they unite in giving the son in adoption to another household.[1] Accordingly the wife is not the mere chattel of her husband, who owns the children by virtue of his proprietorship in the mother.[2] The house-father appears in the sacred books as lord of the wife, who owes him reverence and obedience; yet she is not reduced to patriarchal slavery. With the husband she exercises joint control over the sons; and these are released entirely from parental authority when they marry and establish new households.[3] The male line takes legal precedence; but the maternal kindred are clearly recognized in a way wholly inconsistent with strict agnation.[4] According to the primitive Indic conception the wife is regarded as incapable of property. Neither the widow nor the daughters could inherit, the estate passing to the sons as in theory a means of providing for the *sacra* of the deceased house-father. Still the bride possessed her personal belongings—her couch, clothing, and ornaments; and from this germ gradually arose, beginning even in remote antiquity, her existing rights of property and inheritance.[5] In short, the old Aryan

[1] LEIST, *op. cit.*, 103, 115, 504 ff. On the position of the house-mother *cf.* HEARN, *Aryan Household*, 86–91.

[2] LEIST, *op. cit.*, 122, 123, 126 ff., successfully combats the theory of KOHLER ("Indisches Ehe- und Familienrecht," *ZVR.*, III, 394), who declares that it is a cardinal principle of Indo-Germanic legal evolution that "die Vaterschaft beruht auf dem Rechte des Mannes am Weibe, kraft dessen dem Hausvater das Kind des Weibes zukomme, ebenso wie dem Eigenthümer des Feldes die Frucht." The same view is expressed by KOHLER in *Krit. Vjschr*, N. F., IV, 17, 18; and in "Vorislamitisches Recht," *ZVR.*, VIII, 242. *Cf.* UNGER, *Die Ehe*, 11, 77; LIPPERT, *Geschichte der Familie*, 95 ff., 99, 158.

[3] Although the married son possessed a hearth and was a free member of the *gens*, "his house did not become fully independent in religious and property matters till the death of the father and the final division of the property."—BOTSFORD, *Athenian Constitution*, 27, and the sources there cited. *Cf.* ZIMMER, *Altindisches Leben*, 326 ff.; LEIST, *Alt-arisches Jus Gentium*, 124.

[4] MCLENNAN, *Patriarchal Theory*, chaps. xvi, xvii; LEIST, *op. cit.*, 124, 504 ff.

[5] LEIST, *op. cit.*, 496–508; KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 424 ff.

household reveals but the elements of agnation and the *potestas* as they appear in the Roman law.[1]

This conclusion is confirmed by the customs of the Aryan peoples after the separation. Among the Hellenes at the first dawn of history the family appears as a member of the *gens*, which is held together usually by the ties of blood-relationship. The house-father is lord or monarch of the family. But his authority is tempered in various ways. Originally, as among the primitive Aryans, he may have exercised the power of life and death over his children; but in no case could he "put a child to death without the consent of the collective ancestors," or near kindred.[2] By the Aryans the *jus vitae necisque* was never looked upon as an arbitrary right of destruction, but merely as a means of domestic discipline.[3] The Greek father might sell his minor sons and unmarried daughters; but "it appears that, even here, merely the labor of the youth and not the person itself

[1] LEIST, *Graeco-italische Rechtsgeschichte*, 95, 96. Lack of space prevents any attempt at a detailed discussion of the old Aryan or Indic family and matrimonial law; a general reference must suffice: LEIST, *Alt-arisches Jus Gentium*, 59 ff., 496 ff.; *Graeco-italische Rechtsgeschichte*, 7 ff., 57 ff., *passim;* SCHRADER, *Sprachvergleichung und Urgeschichte*, 379-95; ZIMMER, *Altindisches Leben*, 305-36; JOLLY, *Rechtliche Stellung*, 1 ff.; *idem*, *Hindu Law of Partition*, 70 ff.; KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 342-442; and his various articles, *ibid.*, VI, 344-46 (Indian Archipelago and Caroline Islands); VII, 201-39 (Punjab); VIII, 89-147, 262-73 (Indian customary law); IX, 323-36 (Bengal); X, 66-134 (Bombay); XI, 163-74 (Indian Northwest Provinces); BOTSFORD, *Athenian Constitution*, 2-67 (excellent); WAKE, *Marriage and Kinship*, 159 ff., 355 ff., index; BERNHÖFT, "Altindisches Familienorganisation," *ZVR.*, IX, 1-45; MCLENNAN, *Patriarchal Theory*, 50 ff., 96 ff., especially the chapters on "sonship among the Hindoos," 266-339, combating the view of MAINE, *Early Law and Custom*, 78-121, 232 ff.; *Early Hist. of Inst.*, 116-18, 310 ff.; and MAYNE, *Hindu Law and Usage*, 50 ff., 60 ff., *passim;* STARCKE, *Primitive Family*, 100 ff.; LETOURNEAU, *L'évolution du mariage*, index; HEARN, *Aryan Household;* UNGER, *Die Ehe*, 21-27; BADER, *La femme dans l'Inde antique*, 39 ff.; JACOLLIOT, *La femme dans l'Inde*, 7 ff.

[2] BOTSFORD, *Athenian Constitution*, 50; LEIST, *Graeco-italische Rechtsgeschichte*, 59 ff. WESTERMARCK, *Human Marriage*, 230, justly observes that the power of the father among the Greeks, Germans, and Celts, "to expose his children when they were very young and to sell his marriageable daughters, does not imply the possession of a sovereignty like that which the Roman house-father exercised over his descendants at all ages."

[3] LEIST, *op. cit.*, 60, and 59 ff., for his discussion of the Aryan custom of exposing new-born children.

was disposed of by sale," and the custom was controlled by the usage of the *gens*.[1] The wife, as among the Hindus, holds a dignified position in the household. She is her husband's partner in the domestic economy and the sacred rites. Equally with him she is "the cause of the son's existence," and in consequence exercises over him conjointly with the father the powers of sale and life and death.[2] Thus Hellenic custom preserves the essential element of the Aryan paternal authority, which signifies a protecting, not an arbitrary or ruthlessly destructive, power. Among the historic Greeks the agnatic principle finds expression especially in the right of guardianship, which is transmitted in the paternal line. Such is the judgment of Leist, whose masterly account of the development of the Aryan agnatic conception proves that here as elsewhere the Roman and the Greek stood upon common ground.[3] The point of divergence is the lifelong continuance of the Roman *potestas;* whereas in Hellas the son was emancipated at maturity.[4]

Examination of the customs of the Celts,[5] the Slavoni-

[1] BOTSFORD, *op. cit.*, 51; FUSTEL DE COULANGES, *Ancient City*, 118, 120, notes; PLUTARCH, *Solon*, 13.

[2] BOTSFORD, *op. cit.*, 52; LEIST, *op. cit.*, 57, 58, 64, 11 ff.

[3] *Ibid.*, 57–102.

[4] In the post-Homeric age agnation did not exist; see BOTSFORD, *op. cit.*, 73. In general on the Greek family see HRUZA, *Ehebegründung nach attischem Rechte*, 8 ff.; MCLENNAN, *Studies*, I, 121–23, especially the essay on "Kinship in Ancient Greece," *ibid.*, 195–246 (favoring the maternal system); BOTSFORD, *op. cit.*, chaps. i, ii, iii, supporting the patriarchal theory; but Dr. Botsford's patriarchal family is not that of Sir Henry Maine; LASAULX, *Zur Gesch. u. Philos. der Ehe bei den Griechen*, 3 ff.; DARGUN, *Mutterrecht und Raubehe*, 2, 3, 14; GIRAUD-TEULON, *Les origines, etc.*, 286–301; WAKE, *Marriage and Kinship*, 24 ff., 355 ff., 366 ff., who criticises McLennan's view in detail for the Aryan peoples; KOVALEVSKY, *Tableau*, 35, 36; BERNHÖFT, "Das Gezetz von Gortyn," *ZVR.*, VI, 281–304, 430–40; and his "Ehe- und Erbrecht der griechischen Heroenzeit," *ibid.*, XI, 326–64, both articles being of great value; KOHLER, "Die Ionsage und Vaterrecht," *ibid.*, V, 407–14, who proves the existence of "judicial" fatherhood; WESTERMARCK, *Human Marriage*, 232, 233; UNGER, *Die Ehe*, 52–65; BADER, *La femme grecque*, I, 41 ff.; II, 1 ff. See also HEARN, *Aryan Household*, and FUSTEL DE COULANGES, *Ancient City*, for much valuable matter.

[5] MCLENNAN, *Patriarchal Theory*, 120–31; *Studies*, I, 68 ff., 118; GIRAUD-TEULON, *Les origines, etc.*, 329–32; KOVALEVSKY, *Tableau*, 31, 32; MAINE, *Early Hist. of Inst.*, 216 ff., *passim.*

ans,[1] and ancient Germans[2] leads to a like result. Accordingly we are forced to admit the accuracy of Gaius's conclusion. Writing in the time of the Antonines, he declares his belief that the *patria potestas* is peculiarly a Roman institution. Only among the Asiatic Galatæ had he observed a similar authority exercised by the father over his children.[3] Instead of existing "almost everywhere," often preserving as in a mold the imprint of the paternal power which it has outlived and upon which it is thought always to depend, among Aryan peoples agnation is found together with the *potestas* only in one instance, that of the Roman law; and even in this case it was virtually the first to expire.[4] For, as is well known to the student of Roman jurisprudence, strict agnation, as determining right of succession, disappeared under the influence of the edict and imperial statutes long before the last vestige of the real *patria potestas* was swept away by the legislation of Justinian.[5]

Furthermore, in addition to the historical difficulty, there is another strong reason for doubting the dependence of agnation upon *patria potestas:* the inconsistency of the latter

[1] The South Slavonian house community is an early institution; see KRAUSS, *Sitte und Brauch der Südslaven*, 2 ff., 64–128; BOTSFORD, *op. cit.*, 12–21; GIRAUD-TEULON, *op. cit.*, 340, 341; MCLENNAN, *op. cit.*, 71–119; MAINE, *Ancient Law*, 118; *Early Law and Custom*, 232–82. But it is not primitive. KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, chaps. i, ii, finds many survivals, as he believes, of an earlier maternal system of kinship and succession.

[2] The question for the Germans will be again referred to; see chap. vi, below.

[3] GAIUS, I, 55, Poste, 61.

[4] Such is the view of MCLENNAN, *Patriarchal Theory*, 136–40, 181 ff., 205 ff., 214, 260–62, where Maine's theory of agnation is criticised.

[5] "The last vestiges of the two disappeared from the law together. But, in fact, agnation went first. The paternal powers were susceptible of abridgment and restriction in various ways short of extinction The wife might become free from them; the children also; and yet they might remain for the slaves. And it was thus gradually that they perished. But agnation is perfect, or it ceases to be agnation. And the moment the ties of blood through women received civil effects agnation was no more."—*Patriarchal Theory*, 182. On the decay of agnation and *patria potestas* see SOHM, *Institutes*, 357, 358, 389–93, 438–47; PUCHTA, *Institutionen*, II, 18, 384 ff., 431 ff., 457 ff.; MUIRHEAD, *Introduction to the Private Law of Rome*, 422 ff., 343–49; MAINE, *Ancient Law*, chap. v; MOREY, *Roman Law*, 78, 129, 150, 240–43, 248.

in its effects upon kinship. If the descendants of married women are excluded from relationship, solely on the ground that they belong to another *potestas*, why, for the same reason, should not the children of men, say of brothers *sui juris*,[1] be likewise mutually excluded? Plainly some more satisfactory explanation of this remarkable discrimination between the sexes must exist. Such an explanation McLennan finds in exogamy, or the custom which forbids marriage between persons of the same group of acknowledged kindred.[2] It seems probable that in early times the patrician family was coextensive with the *gens*. *Agnatio* and *gentilitas* were equivalent expressions.[3] During the historical period, at any rate, *gentilitas* is traced through the male line; and it is not impossible that originally intermarriage was forbidden between those bearing the same gentile name.[4] In that case, agnation appears as the natural result of the gentile rule of exogamy, retained, after the weakening of the *gens*, for the regulation of succession within the family. Exogamy, however, does not necessarily imply the *patria potestas*, but is found more frequently perhaps with the maternal than with the paternal system of kinship.[5] In fact, for the Romans and kindred Italic tribes, considerable evidence has been collected by various writers pointing, as they believe, to an early transition from

[1] MCLENNAN, *Patriarchal Theory*, 190. [2] *Ibid.*, 194, 195.

[3] *Ibid.*, 204–14. *Cf.* MUIRHEAD, *Introduction to the Private Law of Rome*, 43.

[4] PLUTARCH, *Roman Questions*, VI, tells us that "in early times the prohibition of marriage extended as far as the tie of blood; and, if this be received, it involves — since the gentiles considered themselves to be of the same blood — that there could not be marriage between persons of the same gens."—MCLENNAN, *op. cit.*, 206, 207.

[5] LEIST, *Graeco-italische Rechtsgeschichte*, 95, 96, also denies (against MARQUARDT, *Privatleben*, I, 22, 29) that the distinctive feature of the Roman family is dependent on the patriarchal authority, since the elements of agnation and paternal power are Aryan. BERNHÖFT, "Germanische und moderne Rechtsideen im rezipirten röm. Recht," *ZVR.*, IV, 234, holds that Roman agnation does not depend upon blood-relationship, but upon power; and this was an Aryan characteristic; *idem*, *Röm. Königszeit*, 69 ff., 94, 201. McLennan's hypothesis is plausible, though not strongly supported by proof. *Cf.* STARCKE, *Primitive Family*, 101; WAKE, *Marriage and Kinship*, 384, 385.

the maternal to the cognatic or the agnatic system.[1] While this conclusion may be rejected, it must nevertheless be admitted that criticism of the patriarchal theory has been very successful in its general results. It appears to have established beyond question the complex and highly artificial character of the Roman family.[2] So far from being the type of early social organization, it is seen to be relatively modern and ill fitted to the condition of primitive men.

In the meantime, the patriarchal theory has had to reckon with a totally different view of the genesis and development of social institutions. To this view let us now turn.

[1] Such are the isolated facts comprised in the early annals which seem to imply acknowledged kinship in the female line, even precedence of the latter; the fact that the status of slaves, illegitimate children, and the children of concubines was determined by the condition of the mother; the effects of marriage by *usus;* the supposed evidences of former wife-capture and wife-purchase, marking the transition to the agnatic system; the instances of wife-lending as by the elder Cato; and especially the plebeian element; for cognation, not agnation, prevailed among the plebeians, and possibly among them kinship was at first counted only through the mother; see DARGUN, *Mutterrecht und Raubehe*, 9–13, 14; *Mutterrecht und Vaterrecht*, 115; BERNHÖFT, "Zur Geschichte des europäischen Familienrechts," *ZVR.*, VIII, 197–201; "Germanische und moderne Rechtsideen im rezipirten röm. Recht," *ibid.*, IV, 227 ff.; *Staat und Recht der röm. Königszeit*, 192, 202–7; GIRAUD-TEULON, *Les origines du mariage*, 408–26; SOHM, *Institutes*, 360, 361, notes; KARLOWA, *Die Formen der röm. Ehe*, 1 ff.; MCLENNAN, *Patriarchal Theory*, 194 ff., 205 ff., 259 ff.

[2] "Die Ehe des römischen Civilrechts (justum matrimonium) war eine formgebundene, durch und durch künstliche Institution."—DARGUN, *Mutterrecht und Raubehe*, 10. *Cf.* BERNHÖFT, *Staat und Recht der röm. Königszeit*, 196 ff.

CHAPTER II

THEORY OF THE HORDE AND MOTHER-RIGHT

[Bibliographical Note II.—A pioneer in the comparative history of marriage and the family is Unger, *Die Ehe in ihrer welthistorischen Entwicklung* (Vienna, 1850), who notices many of the leading phenomena connected with these institutions in different parts of the world; but his book is essentially a *Tendenzschrift*, to prove the elevating influence of Christianity and Teutonism. The literature of the Horde and Mother-Right opens, however, with Bachofen's singular but learned treatise, *Das Mutterrecht: Eine Untersuchung über die Gynaikokratie der alten Welt nach ihrer religiösen und rechtlichen Natur* (Stuttgart, 1861), of which the original edition is now exceedingly scarce, although there is an exact reprint (Basel, 1897). This work is supplemented by Bachofen's *Die Sage von Tanaquil* (Heidelberg, 1870), and his *Antiquārische Briefe* (Strassburg, 1886). Upon the *Mutterrecht* was based Giraud-Teulon's *La mère chez certains peuples de l'antiquité* (Paris and Leipzig, 1867); followed by *Les origines de la famille* (Geneva, 1874), and *Les origines du mariage et de la famille* (Geneva and Paris, 1884), in both of which Bachofen's principal conclusions are supported with much new material. A thoroughgoing disciple of the same school is Lippert, *Die Geschichte der Familie* (Stuttgart, 1884); and *Kulturgeschichte der Menschheit* (Stuttgart, 1886–87). Very important also in this connection are the *Mutterrecht und Raubehe* of Dargun (Breslau, 1883), and his later treatise, *Mutterrecht und Vaterrecht* (Leipzig, 1892), a very able defense of the theory of mother-right for the Aryan peoples after the separation, though conceding that the maternal system was not developed in the primitive stage.

A scholar, who in the main belongs to the same group and who is one of the foremost students of the laws and usages of savage and barbarous peoples, is Post, whose more important writings are *Die Geschlechtsgenossenschaft der Urzeit* (Oldenburg, 1875); *Der Ursprung des Rechts* (Oldenburg, 1876); *Die Anfänge des Staats- und Rechtsleben* (Oldenburg, 1878); *Die Grundlagen des Rechts* (Oldenburg, 1884); *Einleitung in das Studium der ethnologischen Jurisprudenz* (Oldenburg, 1886); *Afrikanische Jurisprudenz* (Oldenburg and Leipzig, 1887); *Studien zur Entwicklungsgeschichte des Familienrechts* (Oldenburg and Leipzig, 1889); and "Die Kodifikation des Rechts der Amaxosa von

1891," in *ZVR.*, XI. The last-named paper may be read in connection with Rehme's "Ueber das Recht der Amaxosa," in *ZVR.*, X; Kohler's "Ueber das Negerrecht, namentlich in Kamerun," *ibid.*, XI; Bertholon, "Les formes de la famille," in *Arch. de l'anth. crim.*, VIII (1893); Zöller, *Forschungsreisen in der Kolonie Kamerun* (Berlin and Stuttgart, 1886); the *Kamerun* of Buchner (Leipzig, 1887); Munzinger's *Ostafrikanische Studien* (Schaffhausen, 1864); the important work of Fritsch, *Die Eingeborenen Süd-Afrikas* (Breslau, 1872), treating of the family customs of various aboriginal tribes; Kranz, *Natur- und Kulturleben der Zulus* (Wiesbaden, 1880); Kingsley, *Travels in West Africa* (London, 1897); Tillinghast, *The Negro in Africa and America* (New York, 1902).

By entirely different routes the theories of universal communism and mother-right were reached by Lewis H. Morgan, beginning with the *League of the Iroquois* (Rochester, 1851); followed by his great work on *Systems of Consanguinity and Affinity* (Washington, 1871); the systematic treatise entitled *Ancient Society* (New York, 1878); and the *Houses and House-Life of the American Aborigines* (Washington, 1881); and by J. F. McLennan, *Primitive Marriage* (1865); reprinted with other papers as *Studies in Ancient History* (London, 1876). After the author's death appeared the *Patriarchal Theory* (London, 1885), edited and completed by his brother Donald McLennan; and the second series of *Studies* (London and New York, 1896), edited by his widow and Arthur Platt.

Sir John Lubbock, *Origin of Civilization* (New York, 1889), maintains the theory and introduces the name of "communal marriage." McLennan is in the main supported by Robertson Smith, *Kinship and Marriage in Early Arabia* (Cambridge, 1885). This book may be read in connection with Wilken, *Das Matriarchat bei den alten Arabern* (Leipzig, 1884); Kohler, "Vorislamitisches Recht der Araber," in *ZVR.*, VIII; Friedrichs, "Das Eherecht des Islams," *ibid.*, VII; Vincenti, *Die Ehe im Islam* (Vienna, 1876); Pischon, *Der Einfluss des Islams auf das häusliche, soziale, und politische Leben seiner Bekenner* (Leipzig, 1881); Perron, *Femme arabe* (Paris and Alger, 1858); Kremer, *Kulturgeschichte des Orients unter den Kalifen* (Vienna, 1875); Vámbéry, *Der Islam im neunzehnten Jahrhundert* (Leipzig, 1875); his *Türkenvolk* (Leipzig, 1885); Hanoteau and Letourneux, *La kabylie et les coutumes kabyles* (Paris, 1893); and Baway, "The Marriage Customs of the Moors of Ceylon," in *Journal of the Royal Asiatic Society*, Ceylon Branch, 1887–88, X, 219–33 (Colombo, 1888). Read also Redhouse, *Notes on Tylor's 'Arabian Matriarchate,'* propounded by Tylor before the British Association, Montreal, 1884.

For the matrimonial institutions of the Australian aborigines, whose so-called "group-marriage" has played so great a part in speculation, see especially Fison and Howitt, *Kamilaroi and Kurnai*

(Melbourne, 1880), supplemented by their "Deme and the Horde," in *Journal of the Anth. Inst.*, XIV, 142–68 (London, 1885), comparing Attic and Australian classes and local divisions; Fison's article on "Primitive Marriage," in *Pop. Sci. Monthly*, XVII (New York, 1880); his paper on "Classificatory Systems of Relationship," in *Brit. Assoc. Adv. Sci.* (Oxford, 1894); Howitt's "Remarks on the Class Systems Collected by Mr. Palmer," in *Journal of the Anth. Inst.*, XIII, 335–46 (London, 1884); his "Dieri and Other Kindred Tribes of Central Australia," *ibid.*, XX; "Further Notes on the Australian Class Systems," *ibid.*, XVIII, 31–36 (London, 1889); "Organization of Australian Tribes," in *Trans. Roy. Soc. of Victoria*, I, Part II (1889); and his "Australian Group Relations," in *Rep. Smith. Inst.*, 1883 (Washington, 1885). Important also are Cunow, *Die Verwandtschafts-Organisationen der Australneger* (Stuttgart, 1894), supplementing Morgan's *Ancient Society*, while rejecting some of Morgan's and Fison's conclusions; Kohler, "Das Recht der Australneger," in *ZVR.*, VII; his later *Zur Urgeschichte der Ehe* below named; McLennan, *Studies*, II, 278–310; Curr, *The Australian Race* (Melbourne, 1886), rejecting the theory of "group-marriage" and promiscuity; especially Roth's *North-West-Central Queensland Aborigines* (Brisbane and London, 1899); and Spencer and Gillen's very able and detailed account of the *Native Tribes of Central Australia* (New York and London, 1899), both of which works, like those of Kohler, tend to sustain the general, though not all the incidental, conclusions of Fison and Howitt. Among the many papers and books useful for studying the social life of the Australians are Palmer, "Notes on Some Australian Tribes," in *Journal of the Anth. Inst.*, XIII (London, 1884); Mathew, "The Australian Aborigines," in *Journal of the Royal Society of New South Wales*, XXIII (Sydney, 1889); Mathews, "Australian Class Systems," in *The Am. Anthropologist*, IX, X (Washington, 1896–97); and his "The Victorian Aborigines," *ibid.*, XI (Washington, 1898). Supplementary materials may likewise be found in Dawson, *Australian Aborigines* (Melbourne, Sydney, and Adelaide, 1881); Jung, *Das Welttheil Australien* (Leipzig, 1882); Smyth, *Aborigines of Victoria* (London, 1878); Smith and Stewart's *The Booandik Tribe* (1880); Lang, *Social Origins;* Atkinson, *Primal Law* (published together, London, New York, and Bombay, 1903); and especially Crawley, *Mystic Rose* (London and New York, 1902).

McLennan was first systematically and luminously criticised by Spencer, in Part III of his *Principles of Sociology* (published, in parts, 1874–77; complete, New York, 1879). McLennan replied in two articles in the *Fortnightly Review*, XXVII (London, 1877); and in turn Spencer has a "Rejoinder," reprinted in his *Various Fragments* (New York, 1898). Gomme supplements McLennan's evidences for his "Theory of

the Primitive Horde," in *Journal of Anth. Inst.*, XVII (London, 1888); and this article is criticised by Wake, *Primitive Human Horde*, reprinted from *ibid.*, February, 1888. Morgan is supported by Engels, *Ursprung der Familie* (Stuttgart, 1892). His researches are appreciatively reviewed and supplemented by Bernhöft, *Verwandtschaftsnamen und Eheformen der nord-amerikanischen Volksstämme* (Rostock, 1888); and they are criticised by Lubbock, "On the Development of Relationships," in *Journal of Anth. Inst.*, I (London, 1872). The views of Morgan and McLennan are examined by Wake in his "Classificatory Systems of Relationship," *ibid.*, VIII (London, 1879); and his "Primitive Human Family," *ibid.*, IX (London, 1880). See also his "Nature and Origin of Group Marriage," *ibid.*, XIII (London, 1884); and his *Le mariage communal* (Paris, 1875), replying to Barbier. An able conservative writer, vigorously and learnedly attacking the fundamental conclusions of recent sociological and ethnological science, is Schneider, *Die Naturvölker: Missverständnisse, Missdeutungen und Misshandlungen* (Paderborn and Münster, 1885–86). He is severely criticised by Hellwald, whose *Menschliche Familie* (Leipzig, 1889) is one of the most original contributions to our subject. This was preceded by the same writer's *Kulturgeschichte* (3d ed., Augsburg, 1883). Important monographs are Bobbio, *Sulle origine e sul fondamento della famiglia* (Turin, 1891); and the clear summary of Th. Achelis, *Die Entwicklung der Ehe* (Berlin, 1893); which may be read in connection with Dr. A. Achelis's "Geschlechtsgenossenschaft," in *Zeitschrift der Gesellschaft für Erdkunde*, No. 148 (Berlin, 1890). Of service also in connection with various topics are Cunow, "Die ökonomischen Grundlagen der Mutterherrschaft," in *Neue Zeit*, No. 4, XVI. Jahrg., I. Band (Stuttgart, 1897); Ploss, "Ueber das Heirathsalter der Frauen bei verschiedenen Völkern," in *Mittheilungen der Ver. für Erdkunde*, 1872 (Leipzig, 1873); Redslob, *Levirats-Ehe bei den Hebräern* (Leipzig, 1836); Danks, "Marriage Customs of the New Britain Group," in *Journal of Anth. Inst.*, XVIII, No. 3; Roth, "Significance of the Couvade," *ibid.*, XXII (London, 1893); Peal, "On the 'Morong,' as Possibly a Relic of Pre-Marriage Communism," *ibid.*, XXII; Ellis, "On Polyandry," in *Pop. Sci. Monthly*, October, 1891; *idem*, *Tschi-Speaking Peoples* (London, 1887); *idem*, *Ewe-Speaking Peoples* (London, 1890); Brouardel, *L'infanticide* (Paris, 1897); Frazer, *Totemism* (Edinburgh, 1887); Peet, "Tribal Records in the Effigies," in *Am. Antiquarian*, XV (Chicago, 1893); Lubbock, "Social and Religious Condition of the Lower Races of Man," *Rep. Smith. Inst.*, 1869 (Washington, 1872); Stricker, "Untersuchungen über die kriegerischen Weiber," in *Archiv für Anthropologie*, V; his *Amazonen in Sage und Geschichte* (Berlin, 1868); Avery, "Races of the Indo-Pacific Oceans," in *Am. Antiquarian*, VI (Chicago, 1884); Greenwood, *The Wild Man at Home* (London, n. d.); Peschel, *Races of Man*

(London, 1889); Zmigrodski's interesting *Die Mutter bei den Völkern des arischen Stammes* (Munich, 1886); Peet, "Houses and House-Life among the Pre-Historic Races," in *Am. Antiquarian*, X (Chicago, 1888), taking the same general view as Morgan; and his "Earliest Abodes of Men," *ibid.*, XV (Chicago, 1893). To bring criticism down to date read Tillier's able and suggestive book *Le mariage: sa genèse, son évolution* (Paris, 1898); Tylor, "The Matriarchal Family," in *Nineteenth Century*, XL, 81 (July, 1896); Kohler, *Zur Urgeschichte der Ehe* (Stuttgart, 1897); Giddings, *Principles of Sociology* (New York and London, 1896); and especially the discussions of the matriarchate, the forms of marriage, and similar topics by Abrikossoff, Westermarck, Letourneau, Kovalevski, and others in *Annales de l'institut international* (Paris, 1896).

A mass of materials relating to every phase of the subject for many peoples may be found in the large general works of Klemm, *Cultur-Geschichte der Menschheit* (Leipzig, 1843–52); Waitz-Gerland, *Anthropologie der Naturvölker* (Leipzig, 1860–72; 2d ed., begun 1877); Featherman, *Social History of the Races of Mankind* (London, 1881–91); and Ratzel, *History of Mankind* (London and New York, 1896–98). General summaries are given by Adams, "Primitive Rights of Women," in *Historical Essays* (New York, 1891); McGee, "The Beginnings of Marriage," in *Am. Anthropologist*, IX (Washington, 1896); Solotaroff, "Origin of the Family," *ibid.*, XI (Washington, 1898); Nadaillac, *L'évolution du mariage* (Paris, 1893); Brinton, "Religions of Primitive Peoples," in his *American Lectures*, 2d series (New York and London, 1897); Devas, *Studies in Family Life* (London and New York, 1886); Lang, "Early History of the Family," in his *Custom and Myth* (London, 1884); Miln, *Wooings and Weddings* (Chicago, 1900); and Hutchinson's popular *Marriage Customs in Many Lands* (London, 1897). An earlier book, inferior though similar in scope to the one last named, is Hamilton's *Marriage Rites, Customs, and Ceremonies* (London, 1822). Of little value, except as marking the beginning of attempts to write general histories, are Moore, *Marriage Customs* (London, 1814; 2d ed., 1820); Laumier, *Cérémonies nuptiales* (Paris, 1829); the amonymous *Hochzeitsgebräuche aller Nationen* (Swabach, 1783); and Hurtaut's *Coup d'œil anglois sur les cérémonies du mariage* (Geneva, 1750), compiled from Louis de Gaya's *Cérémonies nuptiales* (original ed., Paris, 1680). The subject is also treated by Schroeder, *Das Recht in der geschlechtlichen Ordnung* (Berlin, 1893); Gage, *Woman, Church, and State* (Chicago, 1893); and Mason, *Woman's Share in Primitive Culture* (New York, 1894). Mucke, *Horde und Familie* (Stuttgart, 1895), traces the classificatory systems of kinship to original "space-relationships" in the horde camping-place, and the work is a remarkable example of ingenious though fantastic speculation on a large scale.

For the matrimonial customs of low races, especially valuable are Krause, *Die Tlinkit-Indianer* (Jena, 1885); Marshall, *A Phrenologist amongst the Todas* (London, 1872); and the magnificent volumes of Paul and Fritz Sarasin, *Die Weddas von Ceylon* (Wiesbaden, 1892–93). For examples of sexual practices, commonly regarded as survivals of original promiscuity, see Buch, *Die Wotjäken* (Helsingfors, 1882); Kohler, "Studien über Frauengemeinschaft," in *ZVR.*, V; Bastian, *Rechtsverhältnisse* (Berlin, 1872); his "Eheverhältnisse," in *ZFE.*, VI; and his "Matriarchat und Patriarchat," *ibid.*, *Verhandlungen* (Berlin, 1886); Ploss, *Das Weib* (Leipzig, 1895); his *Das Kind* (Leipzig, 1884); and Mantegazza's *Geschlechtsverhältnisse des Menschen*, constituting with the earlier *Physiologie der Liebe* and *Hygiene der Liebe* his so-called "trilogy of love." For the bearings of phallicism on the subject read Howard's *Sex Worship* (2d ed., Washington, 1898), containing a bibliography. In this connection are also of service the works on "seignorial right," the most elaborate monograph being Schmidt's *Jus primae noctis* (Freiburg, 1881), containing a full bibliography. See also his *Slavische Geschichtsquellen zur Streitfrage über das Jus Primae Noctis* (Posen, 1886); his paper in *ZFE.*, XVI; and Kohler's criticism, *ZVR.*, IV, V. Against its existence as a right of the mediæval lord are Veuillot, *Droit du seigneur* (1st ed., Paris, 1854; 3d ed., 1878); Raepsaet, *Recherches* (Gand, 1817); Barthélemy, "Droit du seigneur," in *Revue des questions historiques*, I (Paris, 1866), a critical paper of value; and Labessade, *Droit du seigneur et la rosière de Salency* (Paris, 1878). In his *Réponse* (Paris, 1857) Delpit makes a vigorous and detailed reply to the arguments of Veuillot (early edition). See also Foras, *Droit du seigneur* (Chambéry, 1886); and, for comparison, read "Bibliophile's" *Les nuits d'épreuve des villageoises allemandes avant le mariage* (Brussels, 1877); Grupen's quaint *De uxore theotisca* (Göttingen, 1748); and Fischer's remarkably valuable and interesting *Probenächte der teutschen Bauernmädchen* (Berlin and Leipzig, 1780; reprinted, Leipzig, 1898).

To "break ground" for the study of the subject it may be well in the outset to read chaps. iii and iv of Posada's *Théories modernes;* Kautsky's "Entstehung der Ehe und Familie," in *Kosmos*, XII; Friedrichs, "Ursprung des Matriarchats," in *ZVR.*, VIII, in connection with his "Zur Matriarchatsfrage," in *ZFE.*, XX; and especially his "Familienstufen und Eheformen," in *ZVR.*, X. The literature and the theories are also reviewed by Bernhöft, "Zur Gesch. des eur. Familienrechts," *ibid.*, VIII; and Schurman gives an interesting summary and criticism in *Ethical Import of Darwinism* (New York, 1888).

For the works of Wake, Letourneau, Starcke, Westermarck, and other antagonists of the horde theory, see BIBLIOGRAPHICAL NOTE III.]

I. BACHOFEN AND HIS DISCIPLES

IN the same year with the *Ancient Law* appeared a book which was destined to have an extraordinary influence in giving a new direction to speculation and research. This was the *Mutterrecht* of the Swiss scholar Johann Jacob Bachofen, whose memory is revered by many followers.[1] The author shows a wide and minute acquaintance with classic literature and the early myths; but his work is fantastic and almost wholly devoid of scientific method.[2] The material is drawn mainly from two sources: the fragmentary notices of the rules of kinship and the matrimonial customs of various peoples handed down from ancient writers, supplemented slightly through similar accounts by modern travelers; and an interpretation of the supposed symbolism of religious myths, particularly those of the Greeks.[3] The inferences derived from this second source are often far-fetched and fanciful in the extreme. Though the general results of the investigation are summarized in a short introduction, the argument is so loose, the arrangement so con-

[1] See, for example, LIPPERT, *Geschichte der Familie*, 4, 5; KOHLER, in *ZVR.*, IV, 266 ff., who regards Bachofen as the "Altmeister der ethnologischen Jurisprudenz;" and GIRAUD-TEULON, *Mariage et la famille*, 146 ff., *passim*. *Cf.* KAUTSKY, in *Kosmos*, XII, 348.

[2] DELBRÜCK, "Das Mutterrecht bei den Indogermanen," in *Preussische Jahrbücher*, XCVII, 15, characterizes the work as "fantastic," though resting upon "einer äusserst ausgebreiteten Gelehrsamkeit." DR. STARCKE'S criticism is too severe: "We should rather call his 'Mutterrecht' the rhapsody of a well-informed poet than the work of a calm and clear-sighted man of science."—*Primitive Family*, 243. For the best analysis of Bachofen, see *ibid.*, 241-51. *Cf.* also BERNHÖFT, "Zur Geschichte des eur. Familienrechts," in *ZVR.*, VIII, 4, 5; LUBBOCK, *Origin of Civilization*, 98 ff.; MCLENNAN, *Studies in Ancient History*, I, 319-25; GIRAUD-TEULON, *La mère chez certains peuples de l'antiquité*, 6 ff.; ZMIGRODSKI, *Die Mutter*, 178 ff., 196 ff., 311 ff., *passim;* SCHMIDT, *Jus primae noctis*, 31, 36-38, 178, 190; WAKE, *Marriage and Kinship*, 14 ff., 257, 258; KAUTSKY, "Die Entstehung der Ehe und Familie," *Kosmos*, XII, 256, 257, 348; ACHELIS, *Die Entwicklung der Ehe*, 6 ff.; POSADA, *Théories modernes*, 47 ff., 148; CHAMBERLAIN, *The Child and Childhood in Folk-Thought*, 12 ff.

[3] The author first discusses the account given by Herodotus and others of Lycian customs, which account, he declares, contains the clearest and most valuable evidence of the existence and character of *Mutterrecht* (v). Then follows a similar treatment of the evidence derived from Crete, Athens, Lemnos, Egypt, India and central Asia, Orchomenos and the Minyœ, Epizephyrian Locris, Elis, Lesbos, Mantinea, the Cantabrians, and from the Pythagorean system.

fusing, and the style so obscure that it is with the utmost difficulty the author's meaning can be gathered. Nevertheless it is undeniable that he has created the terminology and developed the essential elements of the communistic and gynocratic theories even in their leading details.

According to Bachofen, there are three general phases in the evolution of human sexual relations. The first is the period of aphrodistic hetairism, in which men and women have each other in common; the second is the period of demetrian mother-right or gynocracy, in which kinship and succession are in the maternal line and woman gains religious and political supremacy; and the third, the period of the patriarchate or apollonistic father-right, in which the more spiritual principle of paternity is triumphant.[1] Each of these periods is regarded as a universal culture-stage.[2]

In the first phase, or that of the unregulated communism, material motherhood is the essential fact. Fatherhood is necessarily uncertain. There is no conception of kinship between father and child. Woman, it is assumed, is exposed to the lust or sexual tyranny of man; and it is through her successful revolt against the bondage of unbridled hetairism that she attains the second stage of progress.[3] The period of demetrian gynocracy is therefore represented as a turning-point, a transitional phase, through which humanity passes from its lowest to its highest status. With it the rudiments of marriage appear, but combined with hetairism surviving in various forms or gradations. It is the woman and not the man who obeys the marriage law.[4] Indeed, strict mar-

[1] *Das Mutterrecht*, vi, xviii-xix, xxi, *passim*.

[2] *Ibid.*, vi. "Wie auf die Periode des Mutterrechts die Herrschaft der Paternität folgt, so geht jener eine Zeit des regellosen Hetärismus voran."—*Ibid.*, xviii. For many illustrations, see the Index at "Aphrodite," "Demeter," and "Apollo," the names of the divinities presiding respectively over the three phases.

[3] "Es kann nicht verkannt werden: die Gynaikokratie hat sich überall in bewusstem und fortgesetztem Widerstande der Frau, gegen den sie erniedrigenden Hetärismus hervorgebildet, befestigt, erhalten."—*Ibid.*, xix; *cf.* xviii, 17-18.

[4] *Ibid.*, 18, *passim*. *Cf.* STARCKE, 245.

riage, the exclusive appropriation of a woman by one man, is looked upon as an abridgment of a natural or religious right for which expiation must be rendered to the goddess whose law is violated;[1] and only thus, as a penalty or composition for the privilege of restricted intercourse, can be rationally explained those lascivious customs, such as temporary prostitution, so often found in connection with legal marriage.[2]

A difficulty, however, presents itself. The theory of Bachofen assumes, as a general fact in social evolution, that a period of promiscuity and oppression of the female sex is followed, not merely by an age of mother-right, involving as a necessary consequence of the continued uncertainty of fatherhood the recognition of kinship only in the maternal line; but by an age of gynocracy, involving the social leadership of women and eventually the political and even the military subordination of men. Woman emancipates herself and then she becomes an Amazon. "Weary of the lust of man, she first feels a longing for a securer position and a purer existence. The feeling of shame and the rage of despair inflame her to armed resistance."[3] As "a rival to man, the Amazon became hostile to him, and began to withdraw from marriage and from motherhood. This set limits to the rule of women, and provoked the punishment of heaven and men. Thus Jason put an end to the rule of

[1] "Das demetrische Prinzip erscheint als die Beeinträchtigung eines entgegengesetzten ursprünglichern, die Ehe selbst als Verletzung eines Religionsgebots. . . . . Nur aus ihm erläutert sich der Gedanke, dass die Ehe eine Sühne jener Gottheit verlangt, deren Gesetz sie durch Ausschliesslichkeit verletzt. Nicht um in den Armen eines Einzelnen zu verwelken, wird das Weib von der Natur mit allen Reizen, über welche sie gebietet, ausgestattet; das Gesetz des Stoffes verwirft alle Beschränkung, hasst alle Fesseln, und betrachtet jede Ausschliesslichkeit als Versündung an ihrer Göttlichkeit."—*Das Mutterrecht*, xix. In general, on the antagonism of Aphrodite to marriage, see *ibid.*, 13, 71, 134, 137, 310, 320, 325.

[2] "Die Prostitution wird selbst eine Bürgschaft der ehelichen Keuschheit, deren Heilighaltung eine vorausgegangene Erfüllung des natürlichen Berufes von Seite der Frau erfordert."—*Ibid.*, xix.

[3] *Ibid.*, xxiv.

the Amazons in Lemnos; thus Dionysos and Bellerophon strove together, passionately, yet without obtaining any decisive victory, until Apollo with calm superiority finally became the conqueror;"[1] and so the purer principle of fatherhood prevailed and the era of father-right appeared. But, says Bachofen, that woman should gain supremacy over man arouses our astonishment, because the fact is contrary to what we should expect from their relative physical powers. "The law of nature delivers the scepter of power to the stronger." The paradox, however, is easily explained. "At all times woman has exerted the most powerful influence upon man, upon the culture and morals (*Gesellung*) of peoples," through the direction of her mind toward the supernatural, the wonderful, and the divine. Through her possession of the mysteries of religion she deprived man of the superior position which nature had given him. "Religion is the only efficient lever of all civilization. Each elevation and depression of human life has its origin in a movement which begins in this supreme department."[2] "Just as the child receives its first discipline from the mother, so do peoples receive it from woman. The man must serve before he can attain supremacy. To the wife alone it is given to tame the unbridled power of man and to guide him in the path of well-doing."[3] But amazonism was a shock to the religious feeling in the stage of mother-right, just as gross hetairism was an offense in the former period.

[1] STARCKE, *Primitive Family*, 246. On the Amazon myth see BACHOFEN, *Das Mutterrecht*, xxiv ff., 85. For many examples of amazonism noticed in the work see Index at "Amazonen;" and compare GIRAUD-TEULON, *Mariage et la famille*, 302–28, who accepts the view of Bachofen and gives an elaborate discussion. According to KOVALEVSKY, *Mod. Customs and Ancient Laws of Russia*, 16 ff., there are evidences of amazonism found among the Slavs. Compare STRICKER, "Untersuchungen über die kriegerischen Weiber," *Archiv für Anthropologie*, V; and his *Amazonen in Sage und Geschichte*.

[2] *Das Mutterrecht*, xiii, xiv. See STARCKE's fine translation of these passages, *op. cit.*, 243–45.

[3] *Das Mutterrecht*, 19; *cf.* STARCKE, 245.

Hence arose a striving for the realization of a higher conception of social relations. "It was the assertion of fatherhood which delivered the mind from natural appearances, and when this was successfully achieved, human existence was raised above the laws of material life. The principle of motherhood is common to all the species of animal life, but man goes beyond this tie in giving the pre-eminence to the power of procreation, and thus becomes conscious of his higher vocation. . . . . In the paternal and spiritual principle he breaks through the bonds of tellurism and looks upward to the higher regions of the cosmos. Victorious fatherhood thus becomes as distinctly connected with the heavenly light as prolific motherhood is with the teeming earth."[1] "All the stages of sexual life, from aphrodistic hetairism to the apollonistic purity of fatherhood, have their corresponding type in the stages of natural life, from the wild vegetation of the morass, the prototype of conjugal motherhood, to the harmonic law of the Uranian world, to the heavenly light which, as the *flamma non urens*, corresponds to the eternal youth of fatherhood. The connection is so completely in accordance with law, that the form taken by the sexual relations of life may be inferred from the predominance of one or the other of these universal substances in worship."[2]

The theories of Bachofen have given rise to luxurious speculation. With slight modification his conclusions have been accepted by a host of faithful disciples. By others they have been criticised or abandoned. Various schemes have been constructed in the attempt to explain the sequence in which the forms of marriage and the phases of the family have historically appeared. With the literature of this speculation, so far as primitive communism is assumed, the

[1] STARCKE'S summary, *op. cit.*, 244; BACHOFEN, xxvii.

[2] STARCKE'S summary, *op. cit.*, 244, 245; BACHOFEN, xxix.

present chapter is concerned. As a rule, only the incidental or negative results of criticism will be noticed, leaving for the following two chapters the criticism originating in a wholly different view of social evolution.

It is convenient in the outset to note the importance of carefully distinguishing between the conception of mother-right, implying kinship in the female line, and that of gynocracy, denoting the supremacy of the female sex.[1] Bachofen, as already seen, uses *Mutterrecht* as comprehending gynocracy; while some of his followers likewise speak confidently of a time when women took social precedence of men, or even held them in political subjection. Such is the view of Giraud-Teulon, who, with Bachofen, interprets the Amazon myth as implying an age in which women exercised a decided social and political domination.[2] Lippert and Unger take a similar position.[3] On the other hand, it is maintained by a number of writers, who reject the idea of a political or military gynocracy, that the inheri-

[1] FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 190, 191, rejects the use of *Mutterrecht* as being practically of "no significance," preferring *Matriarchat* (from ἄρχειν = "to lead") to denote the uterine system of relationship; and *Gynaikokratie*, "gynocracy" (from κρατεῖν = "to rule") to express the idea of the domination of women over men. "Gynocracy" is used to express this idea by the Jesuit LAFITAU (*Mœurs des sauvages*, 1724), borrowed from STRABO (*Geogr.*, lib. iii); PESCHEL, *Races of Man*, 234; PLOSS, *Das Kind*, II, 393. MUCKE, *Horde und Familie*, 108 ff., 114 ff., 174 ff., *passim*, rejects the use of *Mutterrecht* and *Vaterrecht*, and adopts the terms "gynocratic" and "androcratic" family; but these designations had already been employed by other writers, *e. g.*, by PLOSS, *op. cit.*, II, 393-96. "Metrocracy" also appears: WESTERMARCK, *Human Marriage*, 98.

But Dargun's use of *Mutterrecht* and *Vaterrecht* to express maternal or paternal kinship, and *Matriarchat* and *Patriarchat* to express maternal or paternal power, seems preferable, in order to avoid confusing the two conceptions; see above, chap. i, p. 21. Compare further GROSSE, *Die Formen der Familie*, 11, who uses *Mutterfolge* and *Vaterfolge* respectively as opposed to *Matriarchat* and *Patriarchat;* also HELLWALD, *Die mensch. Familie*, 122-24, who gives definitions of "marriage" and "family;" and WESTERMARCK, "Le matriarcat," *Annales*, 115 ff., who shows that in practice writers have used "matriarchate" in three senses.

[2] *Les origines du mariage*, 302-28.

[3] LIPPERT, *Geschichte der Familie*, 17; UNGER, *Die Ehe*, 9. See also GUMPLOWICZ, *Grundriss der Sociologie*, Abschnitt III, who holds that a period of gynocracy preceded the androcratic stage; BARAZETTI, in *ZVR.*, IX, 304-7. See also GAGE, *Woman, Church, and State*, 13 ff.

tance of name and family rights through the mother usually gives woman a decided precedence in the sphere of social life and private law. This is the opinion of Kautsky, who declares that mother-right involves the headship of woman in the family.[1] Peschel,[2] Tylor,[3] Letourneau,[4] and Hellwald[5] hold a similar view; and with them Grosse,[6] Kohler,[7] and Friedrichs,[8] though more reserved, appear in the main to coincide. Dargun likewise rejects the idea of woman's political supremacy, while holding that mother-right sometimes grows into a real matriarchate so far as private law is concerned.[9] The weight of evidence, however, shows that even this modified view exaggerates the advantages gained by woman under mother-right. It may be admitted that here and there—as for instance among the Sioux, the Wyandots, and some other American peoples[10]—the determination of the child's social and legal rights through the mother has somewhat ameliorated the condition of woman. Yet

[1] KAUTSKY, "Die Entstehung der Ehe und Familie," *Kosmos*, XII, 343, 344.

[2] PESCHEL, *Races of Man*, 233, 234.

[3] TYLOR, *Method of Investigating Institutions*, 252.

[4] LETOURNEAU, in *Annales de l'institut international*, 155: "Le mot [matriarcat] doit disparaître, parceque la chose n'a jamais existé."

[5] HELLWALD, *Die mensch. Familie*, 213 ff. But this author (112 ff., 116) shows that among primitive men the sexes were not fully differentiated; so that women often possessed "amazonian" characteristics.

[6] GROSSE, *Die Formen der Familie*, 48, 161 ff., 176 ff., 183. According to Grosse, among the lowest existing races patriarchalism prevails. Examples of women exercising political authority in the clan (*Sippe*) are exceedingly rare, although such may be found occasionally, as among the Huron and Iroquois, and some other peoples.

[7] KOHLER, "Die Ehe mit und ohne Mundium," *ZVR.*, VI, 328, 329. *Cf.* POWELL, "Wyandot Government," *I. Rep. of Bureau of Eth.*, 59–69.

[8] FRIEDRICHS, "Ueber den Ursprung des Matriarchats," *ZVR.*, VIII, 381, 382, though he shows elsewhere that paternal authority may coexist with mother-right: "Familienstufen und Eheformen," *ibid.*, X, 206. *Cf.* MUCKE, *Horde und Familie*, 108 ff., 114 ff., *passim*, who maintains that the family, androcratic or gynocratic, originates in slavery through rape or purchase. In the gynocratic family the woman is owner and mistress of the man, as the man is lord of the woman in the androcratic family.

[9] DARGUN, *Mutterrecht und Vaterrecht*, 67–85.

[10] For an example see POWELL, *op. cit.*, and his "Wyandotte Society," *A. A. A. S.*, XXIX, 675–88.

often, as Dargun[1] has so well shown, the same custom has not enabled her to escape social degradation or marital bondage.[2] She is rather the medium through which rights are conveyed and relations established. "Thus, for instance, among the Australians, with whom the clan of the children is, as a rule, determined by that of the mother, the husband is, to quote Mr. Curr, almost an autocrat in his family, and the children always belong to his tribe."[3] Dr. Starcke reaches a similar conclusion. Referring to the "important place" taken by the wife among various African peoples, he declares that all which "has been said only shows that women in some instances enjoy privileges which are always enjoyed by men."[4] In short, if among many peoples at some stage of progress research has clearly demonstrated the existence of mother-right, it has just as clearly shown that the notion of a gynocracy, of a period of female supremacy, is without historical foundation.

The theory of original communism has been accepted by many writers,[5] though examples of absolute promiscuity

[1] For his theory see the *Mutterrecht und Vaterrecht;* and compare chap. i, pp. 20–23, above.

[2] See POST, *Ursprung des Rechts*, 52–56; *Die Geschlechtsgenossenschaft*, 94, denying the existence of a period of gynocracy; also SPENCER, *Principles of Sociology*, I, 748; PLOSS, *Das Kind*, II, 393; WAKE, *Marriage and Kinship*, 216–19; LETOURNEAU, *L'évolution du mariage*, 131.

[3] WESTERMARCK, *Human Marriage*, 41; CURR, *The Australian Race*, I, 60, 62, 69. DARGUN, *Mutterrecht und Vaterrecht*, 2 ff., insists that *Mutterrecht* denotes merely exclusive kinship through the mother and is entirely consistent with paternal authority. *Cf.* MUCKE, 173 ff.

[4] STARCKE, *op. cit.*, 65; *cf. ibid.*, 229. Fear of the blood-feud through the wife's relatives, as among the Amaxosa, may sometimes act as a check upon the power or brutality of the husband: REHME, "Das Recht der Amaxosa," *ZVR.*, X, 39, 40.

[5] For example, by GIRAUD-TEULON, *Les origines du mariage*, 70 ff., *passim;* LIPPERT, *Kulturgeschichte der Menschheit*, II, 7; BERNHÖFT, "Zur Gesch. des eur. Familienrechts," *ZVR.*, VIII, 161 ff.; ENGELS, *Ursprung der Familie*, 17; KULISCHER, "Die geschlechtliche Zuchtwahl," *ZFE.*, VIII, 140; "Intercommunale Ehe," *ibid.*, X, 193; MORGAN, *Systems of Consanguinity*, 480, 487 ff.; *Ancient Society*, 418, 500–502, 384 ff.; BASTIAN, *Rechtsverhältnisse*, xviii, lix; MCLENNAN, *Studies*, I, 92, 95, *passim;* LUBBOCK, *Origin of Civilization*, 86 ff., 98 ff.; POST, *Anfänge des Staats- und Rechtsleben*, 19; *Geschlechtsgenossenschaft*, 16 ff.; *Grundlagen des Rechts*, 182 ff.; *Familienrecht*, 54 ff.; *Ursprung des Rechts*, 46 ff.; WILKEN, *Das Matriarchat*, 7; GUMPLOWICZ, *Outlines of Sociology*, 110 ff.; and especially KOHLER, in *ZVR.*, IV, 266, 267; V, 334 ff., and elsewhere throughout his numerous papers.

have not been produced.[1] Its former existence is inferred from certain customs and institutions which are believed to be its survivals. Even the promiscuity which is thus assumed is not "perfectly indiscriminate," but restricted to the members of the unorganized horde or tribe occupying a particular locality or roaming about together. Hence, significantly, it has sometimes been described as communal or group "marriage."[2] Accordingly the horde[3] or band becomes the unit or starting-point of social development.

Many evidences of the former universality of promiscuity are brought forward. This evidence—to adopt Westermarck's convenient analysis—"flows from two sources.

[1] Thus GIRAUD-TEULON (*op. cit.*, 70), a zealous advocate of the theory of promiscuity, declares: "Avant d'accepter une semblable hypothèse, il convient cependant de reconnaître que l'on n'a pas encore trouvé de peuplade vivant actuellement en état de complète promiscuité." But, he adds, the facts observed among living tribes "sont en tel nombre, en telle concordance, et confinent de si près à la promiscuité absolue, que ce n'est pas sortir du champ des *hypothèses scientifiquement permises* que de supposer dans l'enfance de l'humanité un état de pur communisme." On the lack of positive proof *cf.* also KAUTSKY, "Die Entstehung der Ehe und Familie," *Kosmos*, XII, 198 ff.; WESTERMARCK, *Human Marriage*, 41; MORGAN, *Ancient Society*, 500 ff.; MCLENNAN, *Studies in Ancient History*, I, 85 ff., 93 ff.; SPENCER, *Principles of Sociology*, I, 662, 664; HELLWALD, *Die mensch. Familie*, 130, 131.

[2] "Communal marriage" is the name introduced by SIR JOHN LUBBOCK, *Origin of Civilization*, 86, 98, 103, 104–9, whose theory is criticised by MCLENNAN, *Studies*, I, 329 ff. "Gruppen- oder Hordenehen" is the term employed by POST, *Familienrecht*, 57, 58; *Grundlagen des Rechts*, 200, 201; *Anfänge*, 10 ff. For the so-called Australian group-marriage see FISON AND HOWITT, *Kamilaroi and Kurnai*, 50 ff., 99 ff., 159 ff.; the criticism of CURR, *The Australian Race*, I, 106–42, which should be compared with KOHLER, "Das Recht der Australneger," *ZVR.*, VII, 326 ff., 329 ff., 337 ff.; his *Zur Geschichte der Ehe*, 64 ff.; CUNOW, *Australneger;* SPENCER AND GILLEN, *Native Tribes of Central Australia;* and CRAWLEY, *Mystic Rose*, 475 ff. In general, on group-marriage see KULISCHER, in *ZFE.*, VIII, 140; X, 193; BERNHÖFT, "Altindisches Familienorganisation," *ibid.*, IX, 5 ff.; SCHROEDER, *Das Recht in der geschlechtlichen Ordnung*, 19 ff.

[3] On the horde see BERNHÖFT, "Zur Gesch. des eur. Familienrechts," *ZVR.*, VIII, 167; WESTERMARCK, *Human Marriage*, 41, 52; FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 194, 197, 198; *idem*, *ibid.*, VIII, 378, 379; KAUTSKY, "Die Entstehung der Ehe und Familie," *Kosmos*, XII, 193 ff. (the *Stamm*); POST, *Geschlechtsgenossenschaft*, 4 ff.; *Familienrecht*, 57, 58; KOHLER, in *ZVR.*, VII, 381; MUCKE, *Horde und Familie;* GROSSE, *Die Formen der Ehe*, 59, 62; FREERICHS, *Zur Naturgeschichte des Menschen*, 106, 107; HELLWALD, *Die mensch. Familie*, 121 ff., 153; GUMPLOWICZ, *Outlines of Sociology*, 110 ff.; and the literature cited below on the Australian class-systems, and on the works of MORGAN and SPENCER.

First, there are, in the books of ancient writers and modern travelers, notices of some savage nations said to live promiscuously; secondly, there are some remarkable customs which are assumed to be social survivals, pointing to an earlier stage of civilization when marriage did not exist."[1] The mass of facts collected to illustrate the licentiousness of savage and barbarous tribes cannot here be dwelt upon.[2] It must suffice for the present to note that, according to recent investigation, every instance of alleged indiscriminate sexual relations appears to stop far short of absolute promiscuity.[3] So also several of the more interesting customs, regarded as direct survivals of communism, require only to be briefly mentioned. The principal argument, of course, as will presently appear, is grounded upon the existence of polyandry, and especially upon the proofs adduced of the wide prevalence of kinship reckoned through the mother's line. For it is generally assumed that this system can arise only when paternity is uncertain. Legalized hetairism or prostitution,[4] practiced

[1] WESTERMARCK, *op. cit.*, 52.

[2] For this class of evidence, see GIRAUD-TEULON, *Les origines du mariage*, 1 ff.: POST, *Familienrecht*, 57, 58; *Anfänge*, 17 ff.; LUBBOCK, *Origin of Civilization*, 69 ff., 104 ff.; BERNHÖFT, "Zur Geschichte des eur. Familienrechts," *ZVR.*, VIII, 161 ff.; MCLENNAN, *Studies*, I, 83 ff.; MORGAN, *Ancient Society*, 500 ff., *passim;* LIPPERT, *Geschichte der Familie*, 168–80; PLOSS, *Das Weib*, I, 331, 360 ff., 370 ff., 383 ff.; KULISCHER, "Die geschlechtliche Zuchtwahl," *ZFE.*, VIII, 140, 141; FRIEDRICHS, "Ursprung des Matriarchats," *ZVR.*, VIII, 370 ff.; MUCKE, *Horde und Familie*, 65, 138 ff., who deny that these customs are evidences of promiscuity; as also does SCHMIDT, *Jus primae noctis*, 36 ff.; KOHLER, "Ueber das Negerrecht, namentlich in Kamerun," *ZVR.*, XI, 419, 422; "Studien über Frauengemeinschaft," *ibid.*, V, 334 ff.; *Zur Urgeschichte der Ehe*, 14, 64 ff., 146; and elsewhere in his various monographs; HELLWALD, *Die mensch. Familie*, 187, 326–29; KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, 6 ff.; SCHNEIDER, *Die Naturvölker*, I, 267 ff.; II, 413 ff., who, rejecting the doctrines of evolution and survival, holds to the biblical legend of the "fall of man."

[3] The result of the recent researches of Spencer, Starcke, Westermarck, Letourneau, and others will be discussed in the next chapter.

[4] Read especially the section of BERNHÖFT, "Zur Geschichte des eur. Familienrechts," 161-221, on "Askese und Hetärismus," who is criticised by MUCKE, *Horde und Familie*, 122; GUYOT, *Prostitution*, 12 ff.; MANTEGAZZA, *Geschlechtsverhältnisse des Menschen*, 366 ff.; and the detailed and learned monograph of ROSENBAUM, *Geschichte der Lustseuche im Alterthume* (Halle, 1893). An examination of the whole subject is given by WESTERMARCK, *Human Marriage*, chap. iv.

under various forms and restrictions among many peoples, savage, barbarous, and civilized, is thought to be a proof of original communism.[1] The same is true of "proof-marriages,"[2] existing among the Wotjäken, Burmese, the Germans, in Loango, and elsewhere; of "temporary" marriages,[3] as among the Parthians and American Indians; and of "wife-lending," examples of which are afforded by the Spartans, Romans, Hindus, Arabs, Eskimo, Germans, Wot-

[1] In this connection are adduced the cases in which courtesans have been held in high esteem, sometimes in higher regard than married women, as in Athens and India: GIRAUD-TEULON, *Les origines du mariage*, 43-45; LUBBOCK, *Origin of Civilization*, 132, 133, 537, 538; POST, *Geschlechtsgenoss.*, 31; SCHROEDER, *Das Recht in der geschlechtlichen Ordnung*, 244 ff.; BERNHÖFT, "Zur Gesch. des eur. Familienrechts," *ZVR.*, VIII, 172-74; KOHLER, "Ueber das Negerrecht," *ibid.*, XI, 419; WESTERMARCK, *op. cit.*, 61 ff., 80, 81, who denies the inference of promiscuity from this custom and mentions many low tribes among whom chastity is observed. *Cf.* FRIEDRICHS, in *ZVR.*, VIII, 374 ff.; SCHNEIDER, *Die Naturvölker*, II, 473, 474, who ascribes the custom to religious impulse — the consecration of virgins to the cult of Aphrodite.

The custom, found among Egyptians, Tibetans, Wotjäken, American Indians, and other peoples, permitting girls freely to prostitute themselves before marriage is similarly put in evidence: HERODOTUS, II, 121, 124, 125, 126; IV, 176; V, 6; POST, *Grundlagen*, 187; *Geschlechtsgenoss.*, 29-31; *Familienrecht*, 346; BUCH, *Die Wotjäken*, 45 ff.; KOHLER, in *ZVR.*, V, 335 (Wotjäken); BERNHÖFT, *op. cit.*, 165, 166; GIRAUD-TEULON, *op. cit.*, 52, 53; UNGER, *Die Ehe*, 12, 13; HELLWALD, *Die mensch. Familie*, 220 ff., 343; WAITZ, *Anthropologie*, II, 112, 113 (Africa); RATZEL, *Hist. of Mankind*, II, 128 (Brazil and ancient Peru); PRATZ, *Hist. de la Louisiane*, II, 386 (Natchez Indians); STEVENSON, in *XI. Rep. of Bureau of Eth.*, 19, 20 (the Sia); TURNER, *ibid.* XI, 189 (the Innuit).

[2] On the so-called "Probeehen" or "Probenächte," see BUCH, *Die Wotjäken*, 50, 51, 53, 57; KOHLER, in *ZVR.*, V, 346, 351, 338, 339; POST, *Anfänge*, 21; DÜRINGSFELD, *Hochzeitsbuch*, 9; SCHMIDT, *Jus primae noctis*, 40; WEINHOLD, *Deutsche Frauen*, I, 261 ff.; FRIEDBERG, *Eheschliessung*, 84; and especially FISCHER, *Ueber die Probenächte der teutschen Bauernmädchen*, who gives a detailed historical investigation from the early Middle Ages onward, with interesting examples. *Cf.* KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, 12, 13 (the *Kirchgang* or *Dorfgehen* of Switzerland, Baden, and Würtemberg).

Among the Todas, after a marriage is arranged, the bride has a proof-time of a night and a day. On the "expiry of this brief honeymoon," the damsel is required to make up her mind "either to accept or reject her suitor."—MARSHALL, *A Phrenologist amongst the Todas*, 212.

[3] STRABO, II, 515; LUBBOCK, *op. cit.*, 131; GIRAUD-TEULON, *op. cit.*, 3; POST, *Geschlechtsgenoss.*, 29, 43 ff; *Anfänge*, 21; especially HELLWALD'S chapter entitled "Zeitehen und wilde Ehen," *Die mensch. Familie*, 438 ff.; and KULISCHER, "Communale Zeitehen," *Archiv für Anthropologie*, XI, 228 ff.; WAITZ, *Anthropologie*, III, 105 (proof and temporary marriages among American Indians); II, 114 (same in Africa); KLEMM, *Kulturgeschichte*, II, 78 (N. A. Indians); TURNER, in *XI. Rep. of Bureau of Eth.*, 189 (Innuit); MCGEE, *The Seri Indians*, in *XVII. Rep. of Bureau of Eth.*, Part I, 280.

jäken, and many other peoples.[1] In this connection, likewise, belong those "scandalous nuptial rites" which Bachofen, Lubbock, and Giraud-Teulon regard as acts of "expiation" for marriage. According to this theory, marriage, the individual possession of a woman, was originally regarded as a violation of communal right, for which some compensation or expiation must be rendered.[2] The customs referred to

[1] PLUTARCH, *Lycurgus*, c. 15 (Sparta); FRIEDRICHS, "Ursprung des Matriarchats," *ZVR.*, VIII, 372, 373; POST, *Anfänge*, 25; *Geschlechtsg.*, 34 ff.; NADAILLAC, *L'évolution du mariage*, 17 ff.; LUBBOCK, *Origin of Civilization*, 131, 132, who mentions the well-known case of Cato's lending his wife Marcia to his friend Hortensius; BUCH, *Die Wotjäken*, 48; KOHLER, in *ZVR.*, III, 398, note (India), 399 (Germans); V, 336 (Wotjäken), 342 (Alaska), 353 (Creeks); VII, 326 (Australia); VIII, 84 (Birma); XI, 422 (Kamerun); JOLLY, in *ZVR.*, IV, 331, 332 (Hindus); SMITH, *Kinship and Marriage*, 116; WAITZ, *Anthropologie*, II, 114 (Africa); NELSON, "The Eskimo about Bering Strait," in *XVIII. Rep. of Bureau of Eth.*, Part I, 292; MCGEE, in *XV. Rep. of Bureau of Eth.*, 178 (Sioux); WESTERMARCK, *op. cit.*, 74 n. 1, mentions, with the sources of information, many tribes among whom wife-lending prevails.

"Exchange of wives" is common among the Eskimo. "For instance, one man of our acquaintance planned to go to the rivers deer hunting in the summer of 1882, and borrowed his cousin's wife for the expedition, as she was a good shot and a good hand at deer hunting, while his own wife went with his cousin on the trading expedition to the eastward. On their return the wives went back to their respective husbands." Sometimes in such cases the women are better pleased with their new mates and remain with them. "According to GILDER (*Schwatka's Search*, 197) it is a usual thing among friends in that region to exchange wives for a week or two almost every two months." EGEDE (*Greenland*, 139) says such temporary exchanges take place at festivals. So also at Repulse Bay, at certain times there is said to be a "general exchange of wives throughout the village, each woman passing from man to man till she has been through the hands of all, and finally returned to her husband."—MURDOCH, "Point Barrow Expedition," *IX. Rep. of Bureau of Eth.*, 413. *Cf.* TURNER, "Ethnology of Ungava Dist.," *ibid.*, 189. The loaning of wife or daughter to a guest, or the prostitution of the wife for hire, appears among some South American tribes: MARTIUS, *Ethnographie*, I, 118; *idem*, *Rechtszustande*, 65.

[2] LUBBOCK, *Origin of Civilization*, 130–32, 536 ff.; GIRAUD-TEULON, *Les origines du mariage*, 5 ff., who says: "Le mariage (en prenant ce mot dans son sense étroit) apparaît chez les races inférieures comme une infraction aux droits de la communauté, et partant, comme la violation d'une loi naturelle: de là, à le considérer comme la violation d'une loi religieuse, il n'y avait qu'un pas." See the criticism by MCLENNAN, *Studies*, I, 335 ff., who rejects the theory of expiation for violation of communal right; because usually the woman does not belong to the husband's tribe, and because often the privileges are exercised by friends of both bridegroom and bride. *Cf.* FISON AND HOWITT, *Kamilaroi and Kurnai*, 149–56; WAKE, *Marriage and Kinship*, 17, 34, 65, 245 ff.; LIPPERT, *Geschichte der Familie*, 169; KOHLER, in *ZVR.*, VII, 327 (Australia); MUCKE, *Horde und Familie*, 138–40, who rejects the theory; and KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, 10, 11, who refers to the promiscuous intercourse practiced at various festivals, resembling the assemblies on the Roumanian Gainaberg which Kohler has discussed in *ZVR.*, VI, 398 ff. These may be compared with the license practiced at certain gatherings among the Arunta and several other Australian tribes: SPENCER AND GILLEN, *Native Tribes of Central Australia*, 96 ff.

fall for the most part in two general classes. The first group comprises the lascivious religious rites, the so-called sacred or temple prostitution, found in connection with the worship of various deities of love and procreation, such as the Babylonian Mylitta, the Hellenic Aphrodite, the Italian Venus and the Carthaginian Moloch.[1] In the second class fall the revolting nuptial privileges, accorded in many parts of the world to priest, chieftain, or king, or to the friends of the bridegroom and sometimes to those of the bride. To these privileges in general the name of *jus primae noctis* has been given.[2] A curious example of

[1] "Thus Herodotus states, in Babylonia, every woman was obliged once in her life to give herself up, in the temple of Mylitta, to strangers, for the satisfaction of the goddess; and in some parts of Cyprus, he tells us, the same custom prevailed. In Armenia, according to Strabo, there was a very similar law. The daughters of good families were consecrated to Anaitis, a phallic divinity like Mylitta, giving themselves, as it appears, to the worship of the goddess indiscriminately."—WESTERMARCK, *Human Marriage*, 72; HERODOTUS, I, c. 199; STRABO, XI, 532. As to Babylon Herodotus may have been mistaken; *cf.* chap. iv, below. See further illustrations in BERNHÖFT, *op. cit.*, 169 ff.; GIRAUD-TEULON, *op. cit.*, 7 ff.; PLOSS, *Das Weib*, I, 383 ff.; LIPPERT, *Geschichte der Familie*, 171; FRIEDRICHS, in *ZVR.*, VIII, 373, who enumerates the peoples where the custom has existed; *idem*, *ibid.*, X, 215, 216; HELLWALD, *Die mensch. Familie*, 356 ff.; and HOWARD, *Sex Worship*, 103-16, 201, *passim*, who holds that sacred prostitution, and many of the other sexual practices usually assigned as survivals of promiscuity, are evidences of phallicism.

[2] The monograph of DR. KARL SCHMIDT, *Jus primae noctis*, is the most elaborate work on the subject. The author denies (41 ff., 365 ff., 379) that the custom existed in feudal Europe or elsewhere as a *right;* and he holds that the practices so called are not evidences of promiscuity. His views are sharply criticised by HELLWALD, *Die mensch. Familie*, 349 n. 4; and especially by KOHLER, in *ZVR.*, IV, 279-87. SCHMIDT has a supplementary discussion in *ZFE.*, XVI, 44 ff.; and is reviewed unfavorably by KOHLER, *ZVR.*, V, 397-406. See also SCHMIDT's *Slavische Geschichtsquellen zur Streitfrage über das Jus Primae Noctis;* KOHLER, *Urgeschichte der Ehe*, 140; *idem*, in *ZVR.*, VII, 350, 351; VIII, 85; SCHNEIDER, *Die Naturvölker*, II, 471-73; GIRAUD-TEULON, *op. cit.*, 32-41; WEINHOLD, *Die deutschen Frauen*, I, 300, 301; LETOURNEAU, *L'évolution du mariage*, 56-62; SUGGENHEIM, *Geschichte der Aufhebung der Leibeigenschaft*, 104, who believes the "right of the lord" existed in France far down into the Middle Ages; BACHOFEN, *Mutterrecht*, 12, 13, 17, 18, *passim;* POST, *Anfänge*, 17, 18; *idem*, *Geschlechtsgenoss.*, 37; KULISCHER, "Die communale Zeitehe," in *Archiv für Anthropologie*, XI, 228 ff., who refers to the recent existence of the alleged custom in Russia; FRIEDRICHS, in *ZVR.*, X, 214, 215; STARCKE, *op. cit.*, 124-26. There is a learned discussion in the quaint *De uxore theotisca*, cap. i, of GRUPEN; the literature cited in Bibliographical Note II should be consulted; and Schmidt has appended a very full bibliography to his book. The term *jus primae noctis* is especially applied to the alleged "right of the lord" in feudal times; but the existence of even this custom as a legal privilege is still an unsettled question.

this practice among the American aborigines is communicated by Castañeda.[1]

The argument for original promiscuity based on the various practices just mentioned is not conclusive. Most, if not all, of them are perhaps capable of other and simpler explanations. The wife-lending, as suggested by Westermarck, may be "due merely to savage ideas of hospitality;"[2] while the custom of sacred prostitution evidently belongs "to phallic-worship, and occurred, as Mr. McLennan justly remarks, among peoples who had advanced far beyond the primitive state. The farther back we go, the less we find of such customs in India; 'the germ only of phallic-worship shows itself in the Vedas, and the gross luxuriance of licentiousness, of which the cases referred to are examples, is of later growth.'"[3] So likewise the *jus primae noctis*, instead of being an expiation for an encroachment on communal right, may be more naturally explained either as an abuse of power,[4] in some cases as an evidence of hospitality,[5] or in others as a "common war-right, exercised whenever, under any circum-

[1] The custom is for the men "to buy the women whom they marry of their fathers and relatives at a high price, and then to take them to a chief, who is considered to be a priest, to deflower them and see if she is a virgin; and if she is not, they have to return the whole price, and he can keep her for his wife or not, or let her be consecrated, as he chooses." In the same connection, Castañeda says, "among them are men dressed like women who marry other men and serve as their wives;" and he describes also a curious kind of legal or consecrated prostitution existing among the same people: see the translation of Castañeda's account in WINSHIP'S "Coronado Expedition, 1540–2," *XIV. Rep. of Bureau of Eth.*, 513, 514. *Cf.* FAWCETT, "On Basivis: Women, Who, through Dedication to a Deity, Assume Masculine Privileges," *Jour. Anth. Soc.* (Bombay), II (1891), 322–54.

[2] WESTERMARCK, *Human Marriage*, 73, 74; WAKE, *Marriage and Kinship*, 81, 82. The custom may possibly be accounted for by the slow growth of the sentiment upon which "conjugal attachment depends:" MCLENNAN, *Studies*, I, 341. For an alleged "survival" see SCHMIDT, *Hochzeiten in Thüringen*, 31. For the strictly regulated form of wife-lending among certain Australian tribes see the reference to the work of Spencer and Gillen below.

[3] WESTERMARCK, *op. cit.*, 72; MCLENNAN, *Studies*, I, 341, 342. This is also the view of CLIFFORD HOWARD in his *Sex Worship*, chaps. v, ix, x.

[4] WESTERMARCK, *op. cit.*, 78; SCHMIDT, *Jus primae noctis*, 41.

[5] WESTERMARCK, *op. cit.*, 73.

stances, capture of a woman is made by a war-party."[1] The toleration of the custom, like that of wife-lending, may sometimes be due to the "juridical" nature of fatherhood as conceived by primitive men.[2]

On the other hand, the theory that these customs are evidences of original sexual communism has gained support from the recent researches of Spencer and Gillen in their very able and detailed book on the *Native Tribes of Central Australia.* Among these aborigines, the authors declare, "so far as marital relations . . . . are concerned, we find that whilst there is individual marriage, there are, in actual practice, occasions on which the relations are of a much wider nature. We have, indeed, in this respect three very distinct series of relationships." First we find the present "normal condition of individual marriage with the occasional existence of marital relations between the individual wife and other men of the same group as that to which her husband belongs, and the occasional existence also of still wider marital relations;" secondly "we have evidence of the existence at a prior time of actual group marriage;" and in the third place "we have evidence of the existence at a still earlier time of still wider marital relations."[3]

[1] MCLENNAN, *op. cit.*, I, 337; WESTERMARCK, *op. cit.*, 76.

[2] The well-known theory of STARCKE, *op. cit.*, 121–27. It is not essential, according to this view, in early stages of development, that a child should be actually begotten by the father. It is enough that it should be borne by his legal wife and be accepted by him. Hence the *jus primae noctis*, exercised by a priest, king, or other distinguished person, is sometimes regarded as an honor: *ibid.*, 125, 126; WESTERMARCK, *op. cit.*, 79.

[3] The first series of relationships is seen in the Arunta tribe, where "no man will lend his wife to anyone who does not belong to the particular group with which it is lawful for her to have marital relations — she is, in fact, only lent to a man whom she calls *Unwana*, just as she calls her own husband, and though this may undoubtedly be spoken of as an act of hospitality, it may with equal justice be regarded as evidence of the very clear recognition of group relationship, and as evidence also in favor of the former existence of group marriage." A native, it is true, will sometimes lend his wife "as an act of hospitality to a white man; but this has nothing to do with the lending of wives which has just been dealt with." It "does not imply the infringement of any custom." The second relationship in the series named is of a public nature, and it is strictly regulated by custom. It consists in the defloration

But these usages are capable of a very different explanation. That they imply a primitive state of promiscuity is emphatically denied by Crawley. Like sacred prostitution, the customs of avoidance, the couvade, and marriage rites in general, according to his theory, they take their rise in the religious or superstitious ideas upon which sexual taboo rests.[1]

Adherents of the communistic theory are not entirely at one as to the phases in the development of marriage and the family. Very generally the family, regarded from the standpoint of authority and kinship, is said to pass from the unregulated horde through the maternal and the paternal to the parental or two-sided stage.[2] Thus Dargun declares that there is a tendency for the uterine system of kinship to give place to the paternal, but never the reverse.[3] Kohler takes the same position.[4] Lippert regards the history of social culture as beginning with the natural relation of mother and

of a girl just before her marriage by certain men who have access to her in a definite order. These men belong to forbidden groups; that is, groups into which the woman may not marry. "The ceremonies in question are of the nature of those which Sir John Lubbock has described as indicative of expiation for marriage;" and they may be regarded as "rudimentary customs" pointing back to a stage of wider marital rights than those which now exist in these tribes. The third relationship is the license allowed on "occasions when a large number of men and women are gathered together to perform certain corrobborees," the more important gatherings lasting perhaps "ten days or a fortnight." Every day "two or three women are told off to attend at the corrobboree ground, and, with the exception of men who stand in the relation to them of actual father, brother, or son, they are, for the time being, common property to all the men present." The explanations of similar usages advanced by McLennan and Westermarck, such as phallicism, are deemed inapplicable to these cases: SPENCER AND GILLEN, *Native Tribes of Central Australia*, 92–111. Compare especially KOHLER, *Zur Urgeschichte der Ehe*, 64 ff., *passim*, who finds in the totem groups and classificatory systems of relationship, existing in Australia, America, and elsewhere, evidence of former group-marriage.

[1] *Mystic Rose*, 236–66, 294–317, 347 ff., 468–85, *passim*. *Cf.* LANG, *Social Origins*, 87–111, *passim*.

[2] According to FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 190 ff., the forms of the family are the following: (1) "die lose Familie;" (2) "die matriarchale, uterine Familie;" (3) "die patriarchale, agnatische Familie;" (4) "die moderne, zweiseitige Familie."

[3] DARGUN, *Mutterrecht und Raubehe*, 12, 13. For exceptions, however, see his *Mutterrecht und Vaterrecht*, 29 ff., 35, 41, 46.

[4] KOHLER, in *ZVR.*, III, 393; IV, 266 ff.

child, producing in course of evolution, long before "marriage" arose, the "primitive family" whose principle is mother-right, and which, in turn, under various influences, generally yields to the "old family" (*Altfamilie*) in its origin based, not on relationship, but on patriarchal power and possession.[1] Bernhöft denies the invariable sequence of mother-right and father-right;[2] and Kautsky maintains that the two systems are parallel, not successive, developments from the hetairism of the primitive horde.[3]

Marriage also, like the family, is said to pass through several distinct phases of development. Thus, with respect to the number of persons joining in a household, Friedrichs distinguishes four "forms" of marriage which, with equal propriety, may be called forms of the family. These are group-marriage, polyandry, polygyny, and monogamy, the first three forms having several varieties.[4] But, as will hereafter appear,[5] it would be rash to infer that these forms necessarily arise in the order named. Again, with regard to the way in which it originates, marriage presents a number of successive stages. According to Kohler,[6] these are marriage by capture, marriage by purchase, religious marriage, and civil marriage. That wife-capture generally gives place to wife-purchase, and this in turn to marriage by gift, and then to the modern contract between the parents, or later between the parties themselves, is especially

[1] LIPPERT, *Geschichte der Familie*, 4 ff., 218 ff.; *idem*, *Kulturgeschichte*, I, 76 ff., 90.

[2] BERNHÖFT, "Zur Geschichte des eur. Familienrechts," *ZVR.*, VIII, 401, 402.

[3] KAUTSKY, "Die Entstehung der Ehe und Familie," *Kosmos*, XII, 338–48, especially 347; *cf.* MUCKE, *Horde und Familie*, 172 ff.

[4] FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 256–58.

[5] See below, chaps. iii, iv.

[6] "Wie die Ehe aus der Ueberwältigung der Frau durch den Mann hervorging, und wie sie sich von da aus zum Frauenkaufe gestaltete; wie sie zur religiösen Heilanstalt wurde und wie sie von da aus zum geläuterten Rechtsinstitute umbildete, indem die religiöse Feier nicht mehr obligat blieb, ... lehrt uns das indische Recht klarer, als jedes andere."—"Indisches Ehe- und Familienrecht," *ZVR.*, III, 342, 343.

insisted upon. Hildebrand,[1] however, reverses this order. A measure of progress he finds in what he regards as the three great industrial stages of human culture: those of the chase, pastoral life, and agriculture. In the first stage, not communism, but a tendency toward monogamy prevails. There is little notion of private property; hence covetousness is not a motive of social action. Marriages are freely formed through presents given to the parents, or even without them by simple agreement of the parties. Later, with the rise of private property, marriage by purchase and marriage by capture come into existence; though capture is always exceptional and of comparatively little importance in the history of marriage.

Similar to the view of Hildebrand, in respect to the initial stage, is the theory of Kautsky.[2] The starting-point is the horde. In this absolute equality of the sexes prevails; and the only divisions are the different generations. Neither the maternal nor the paternal line is recognized, for the children belong to the group. Not promiscuity, but "hetairism,"[3] or rather "hetairistic monogamy," exists. Incessant feuds, however, lead to wife-capture; and wife-capture tends directly to communism, for the captured woman belongs as a slave to the band. But the rights of the band may pass to the individual. The free native woman is "wooed;" the war-captive is "fought-for;" and so she becomes the slave-wife of the strongest, who may win other wives in the same way. Marriage by capture thus conquers the original monogamy, in whose place polygyny appears, either at once, or after a transition-period of com-

[1] HILDEBRAND, *Ueber das Problem einer algemeinen Entwicklungsgeschichte*, 14 ff., 17 ff.; *idem*, *Recht und Sitte auf den versch. Kulturstufen*, 9 ff.

[2] KAUTSKY, "Entstehung der Ehe und Familie," *Kosmos*, XII, 190-207, 256-72, 329-48.

[3] KAUTSKY'S use of "hetairism" for "defective" monogamy is apt to become misleading.

munity in women. Moreover, in this process may be discerned the genesis of modern individual marriage under the sanction of the law. But the consequences of wife-capture are not yet exhausted. The presence in the horde of women taken from several neighboring bands leads at once to the formation of clans and to the matriarchate; for the connection of children with the clan is naturally determined by the mother. The development of private property produces still further results. The individual may buy his wife. She becomes his chattel; and the offspring also belong to him. Thus marriage by purchase gains the victory over wife-capture; and the patriarchate triumphs over mother-right. This is the order of development in the more war-like hordes. But wife-capture does not always precede wife-purchase as a general phase. In the more peaceful and industrious groups wife-capture does not appear at all. Here hetairistic monogamy runs its natural course. Partly under the external influence of tribes where mother-right existed as the result of wife-capture, but mainly under the powerful influence of private property, the matriarchate arose. In the earlier stage kinship with the father was disregarded or unknown. Naturally, therefore, under the new condition, name and also property were transmitted to the children through the mother, with whom their physical connection was always manifest. So it appears that the conception of private property is the basis of "hetairistic mother-right" as it is of father-right; and hetairistic mother-right, as distinguished from the mother-right which owes its origin to wife-capture, implies the precedence of woman in the family.[1] "Gynocracy and patriarchalism are therefore parallel branches of the same stem," the original hetairism of the horde: the one cannot be a further development of the other. Gynocracy, and with it polyandry, which is its

[1] KAUTSKY, 339.

result,[1] is the highest stage in the evolution of hetairistic mother-right; just as polygyny and the patriarchal family are the highest stage in the evolution of father-right or the agnatic system of kinship.[2]

To the theory of Kautsky that of Dargun, already explained, bears some resemblance in important details. But Dargun rejects Kautsky's idea of original monogamy; and he does not regard wife-purchase as the necessary source of the patriarchate, though the rise of the latter was greatly favored by it; while mother-right is especially due to the uncertainty of fatherhood.[3]

Hellwald—who in the general development of his subject and in many essential particulars agrees closely with Lippert[4]—seeks the elements of human sexual relations in those of the lower animals. Absolute promiscuity has never existed among men. The hetairism which prevailed was restricted to the immediate band or horde of kindred, which was probably never large. Thus in the horde there was "unregulated polygyny." To the earliest sexual relations[5] of men neither "marriage" nor "family" may properly be applied; and for them no suitable name is forthcoming. In the horde the first social institution evolved was the "mother-group" or rudimentary primitive family (*Urfamilie*). "Mother and child," as Lippert suggests, "these were the simplest elements of the oldest organization." For the

[1] According to KAUTSKY, just as polygyny arises in a *Herrschaftsverhältniss*—the lordship of the man over the captured or purchased woman—so polyandry originates in an analogous relation of the woman to the man. Under gynocracy the woman chooses her husband, hence polyandry; 344-46.

[2] KAUTSKY, 347.

[3] DARGUN, *Mutterrecht und Vaterrecht*, 60, 61, 127, 43-52.

[4] For LIPPERT'S development of the family see his *Geschichte der Familie*, and especially his excellent *Kulturgeschichte*, I, 71-90; II, 1-165, 505-54.

[5] HELLWALD, *Die mensch. Familie*, 121, 122, 126. "Was Platz griff, war wohl ungeregelte Polygamie, welche aber ziemlich naturgemäss Polyandrie nach sich zieht, und aus dieser Vermischung jenen ehelosen Geschlechtsverkehr schuf, für welchen noch die richtige Benennung fehlt."—*Ibid.*, 129.

"relation of mother and child alone is given by nature."[1] In the form of the mother-group the family, however imperfectly constituted, precedes the state in the order of growth; although it is not until society, the state, has gained permanent form that from it the historical "family" is developed.[2] Indeed, the mother-group is "lacking in everything" which distinguishes the family according to our modern conceptions.[3] The history of the "primitive family," so far as mother-right is concerned, shows two stages of evolution. The first stage is that of the mother-group strictly so called, through which, as Bachofen and Dargun declare, every race passes and in which all relationship is traced through the mother's blood.[4] Absolute unity or identity of blood is the basis of the earliest human conception of relationship. Generations or stages of seniority alone (*Altersstufen*), not degrees of kinship, are recognized. Members of the group are of equal blood, "consanguine."[5] Relationship with the father is as yet unknown; and there is in the outset no conception of property. Gradually, however, in the endogamous mother-group a horror of incest, of inbreeding, arises, thus leading to exogamy, which is often facilitated by the stealing of women from surrounding groups. The obtaining of foreign women next produces the clan system. Private property in land and movables arises, especially among those peoples which have attained to settled life and a knowledge of agriculture. In this way the "primitive family" enters upon its second stage—that of the matriarchate. Here we find for the first time forms of marriage

[1] *Ibid.*, 146, 150; LIPPERT, *Kulturgeschichte*, I, 76; *idem*, *Geschichte der Familie*, 20.

[2] HELLWALD, *op. cit.*, 150; FREERICHS, *Zur Naturgeschichte des Menschen*, 103, 104; *cf.* LIPPERT, *op. cit.*, I, 76.

[3] HELLWALD, *op. cit.*, 151.

[4] *Ibid.*, 151; DARGUN, *Mutterrecht und Raubehe*, 3; BACHOFEN, *Mutterrecht*, as above quoted.

[5] HELLWALD, *op. cit.*, 158 ff., accepting MORGAN'S main conclusions in his *Systems of Consanguinity*; and opposing SCHNEIDER, *Die Naturvölker*, II, 474–77.

and the family properly so called, although rudimentary as compared with the modern institutions. The mother ceases to be merely the center of the common life; she is now the social axis around which everything revolves. Mother-right, implying kinship as well as succession to name and property exclusively in the maternal line, becomes fully established. The matriarchate, unlike the simple mother-group, is not a universal phase through which all mankind has run. In some cases the agnatic system or father-right may have followed immediately upon the earlier stage of mother-right. Incident to the matriarchate are the polygynous and polyandrous forms of the family. With these the institution of property grew apace; and so we reach the paternal system, whose triumph is powerfully aided by wife-capture. In this stage, whatever be the form of social union—whether it be called *gens*, *sippe*, or joint-family—it rests upon the authority of the father or patriarchal lord. Following Lippert,[1] the author prefers for this patriarchal group the name "old family" (*Altfamilie*); and he finds its most famous examples in Hellas and Rome. Here monogamy gained the victory; and so, under the influence mainly of Stoicism and Christianity, the foundations of modern marriage and the individual family were laid.[2]

The influence of economic forces on the evolution of matrimonial and family institutions is especially emphasized by Grosse. Restricting his examination to the conditions which lie within actual "historical or ethnological experience," he seeks to demonstrate that the "various forms of the family correspond to the various forms of economy

[1] LIPPERT, *Geschichte der Familie*, 218, 219, who distinguishes between the "Alt- und Gesamtfamilie" and the modern "Sonderfamilie."

[2] Of course, only a bare outline of the author's able treatise is here given. See especially *Die mensch. Familie*, 176 ff. ("Exogamie und Clanbildung"), 197 ff. ("Entwicklungsbedingungen und Wesen des Matriarchats"), 227 ff. ("Die Bündnissformen im Matriarchat"), 274 ff. ("Der Frauenraub und seine Folgen"), 347 ff. ("Ausbildung des Patriarchats"), 529 ff. ("Die Altfamilie").

(*Wirthschaft*);" that "in its essential features the character of each particular form of the family may be explained by the form of economy in which it is rooted." For the sake of clearer analysis the peoples known to history or ethnology are arranged, not in three, but in five groups according to the leading types of industrial life. These are the lower and upper hunters, the pastoral peoples, and the lower and upper cultivators of the soil.[1] But, like Kohler, Lippert, and Hellwald,[2] the author rejects the popular theory adhered to by Hildebrand, that the chase, herding, and agriculture are three successive stages of progress through which all the races of mankind have necessarily passed. For, as a matter of fact, some pastoral peoples, and even some hunters, like the Eskimo, are more advanced in culture than various peoples who are chiefly dependent upon agriculture; and some tillers of the soil, as Hildebrand concedes, may never have passed through the pastoral stage.[3] On the other hand, Grosse distinguishes two forms of the family: the individual family (*Sonderfamilie*), or the community of parents and children living in a lasting and exclusive marriage relation, and the great-family (*Grossfamilie*), which comprises, not merely parents and children, but all descendants with their families, so far as they are not separated from it by marriage or otherwise. Examples of the "great-family" are afforded by the Romans and the Chinese; while the "individual family" is practically the only form known wherever western European culture prevails. In each form of the family either the maternal or the paternal succession (*Mutterfolge* or *Vaterfolge*) may exist; but succession must

[1] "Niedere und Höhere Jäger, Viehzüchter, Niedere und Höhere Ackerbauer."—GROSSE, *Die Formen der Familie*, 25, 26.

[2] LIPPERT, *op. cit.*, 30 ff.; KOHLER, *Zur Urgeschichte der Ehe*, 4, 5, where Hildebrand is criticised; HELLWALD, *op. cit.*, 197 ff., who declares that in the history of civilization it is "undoubtedly more correct to regard, not pastoral life and agriculture, but nomadic life and settled life as the marks of two diverse culture-phases."

[3] GROSSE, *op. cit.*, 29 ff.

not be confused with the matriarchate or with the patriarchate, each involving the idea of authority; although paternal succession usually implies paternal power, while succession in the female line does not necessarily carry with it the supremacy of the mother.

Among the peoples classed as "lower hunters," even the most backward, exists the individual family; and in the majority of cases it is founded on monogamic marriage, for promiscuity nowhere appears. The authority of the husband is patriarchal. "He procures his wife by exchange or service; and in consequence he is her owner and lord." The "great-family" and the *gens* (*sippe*) are also found among these peoples; but they are relatively little developed. *Gentes* which have become unions for protection and control of territory are father-*gentes;* while those in which the kinship is traced through the mother are not unions for the purposes of the common life, but for maintenance of the common name.[1] The case is practically the same for the "upper hunters." Wife-purchase, however, is more pronounced. The individual monogamic family still predominates. Kinship through the mother is not so much a "motive for union as it is for separation of those related by blood."[2] Here as among the lower hunters it is the paternal *gens* which forms an actual union for the common life; and there is "not the least ground for assuming" that a patriarchal gentile constitution has replaced an earlier matriarchal form. Among peoples leading a pastoral life, even more than with those devoted to the chase, the chief economic production lies in the hands of the man. Accordingly he has the place of power and honor. Through him descent and kinship are usually traced. Nowhere is the paternal system so one-sided and so stringently carried out as among pastoral tribes. Woman is

[1] "Im Uebrigen aber bildet die Muttersippe auf dieser Culturstufe noch keine Lebens- sondern nur eine Namensgemeinschaft."—GROSSE, *op. cit.*, 64.

[2] *Ibid.*, 84.

oppressed and degraded. She is bought or stolen by her lord. Polygyny, with all its attendant evils, flourishes. The individual family has a thoroughly patriarchal stamp; but it is still the most conspicuous social fact, surpassing in practical significance for the needs of the pastoral life the great-family, and far more the *gens*. On the contrary, among the lower cultivators woman holds an economic position at least equal in social importance to that of man. As a rule, therefore, she is no longer his slave, but his companion, sometimes even his superior. She gains a corresponding share in the control of the children. The great-family is in like manner affected by the new economic conditions. Communal agriculture gives a mighty impulse to the growth of the gentile constitution; and now among many peoples, under influence of the new and higher position of woman, the maternal *gens*, perhaps existing side by side with the paternal *gens*, is developed into a firm social, economic, and political union. In the life of the lower cultivators, if the *gens* thus becomes the mightiest social organization, the fact is due essentially to its economic function. With the change from communal to individual agriculture the gentile constitution is dissolved; and so among the higher cultivators the individual monogamic family has more than regained its former sway. "Thus it appears," the author summarizes, "that under every form of culture that form of family organization prevails which is best suited to economic needs and conditions;" although, he wisely warns us, a perfect explanation of the various types of the human family can never be given until every part and function of culture which has had an influence upon the functions or the organisms of the family has been separately examined for each case.[1]

The views of Dargun, Hildebrand, and Grosse may be compared with the remarkable, but scarcely well-grounded,

[1] *Ibid.*, 244, 245.

speculation of Mucke.[1] According to his ingenious theory, men originally lived in the horde, which, so far from being a fortuitous unorganized band, in which "animal promiscuity" prevailed, was so strictly ordered as to be worthy the name of the "society of the primeval age."[2] In the horde all are free and equal. There is no subordination of the wife, monogamy prevails; for, since every male or female has his predestined mate, there is no room for communism. The author's treatise rests upon the fundamental assumption that primitive relationships are merely "space-relationships."[3] They do not arise in notions of descent. They are determined by the fixed spaces occupied by each sex, generation, and individual in the *Hordenlager* or camping-place.[4] Every male finds his predestined wife in the corresponding room or division on the opposite side of the sleeping-space; each brother thus marrying the sister nearest to himself in the order of birth. This ideal life of the horde is brought to an end through the rise of the family. The family (from *famel*, a "servant") is the very opposite of the horde of free and equal members, originating as it does in subjection and servitude. Almost simultaneously the family develops two forms, the androcratic and the gynocratic. Each originates

[1] MUCKE, *Horde und Familie in ihrer urgeschichtlichen Entwickelung. Eine neue Theorie auf statistischer Grundlage* (Stuttgart, 1895). Mucke is harshly reviewed by KOHLER, *Urgeschichte der Ehe*, 17–27.

[2] "Genossenschaft der Urzeit." He derives horde from *orta*, *orda*="local community," "Ortsgemeinschaft," hence "order": MUCKE, viii, 40, 41, 43 ff., *passim*.

[3] "Raumverwandtschaften," MUCKE, 1 ff., 20–43, *passim*.

[4] The details of the author's argument cannot here be given. First (*erster Abschnitt*) he appeals to the mental processes of the child. The spaces, and consequently the relationship, arise in the child's sense-perception, the impression obtained by the infant soul of the relative distance or remoteness of persons belonging to the different ages and generations. The very inadequate evidence adduced for the former universality of such *Lager* arrangement (*sechster Abschnitt*) consists (1) of the alleged customs of modern Asiatic hordes; and (2) the remains of ship-shaped graves and dwelling-places discovered in various parts of the world. With wonderful ingenuity the author is able to explain by his theory nearly every problem connected with marriage and the family. Aside from the constructive part of his work, his criticism of other writers, though often unjust and intolerant, is sometimes acute and instructive.

in capture[1] which, under the influence of the conception of private property, yields to purchase. In the androcratic family, the woman becomes a slave-wife; in the gynocratic, the man becomes a slave-husband.[2] Polyandry is the natural product of the gynocratic, as is polygyny of the androcratic family. Originally each of these forms of the family is part "maternal" and part "paternal," in the ordinary sense. But gradually, under the influence of adoption, aided by purchase, the horde is broken up and modern forms of the family arise.[3]

II. MORGAN'S CONSTRUCTIVE THEORY

The doctrine of the primitive horde as the starting-point of social evolution has a special interest in connection with the researches of Lewis H. Morgan and J. F. McLennan. Though their principal works appeared subsequently to that of Bachofen,[4] each has reached his conclusions independently; and each, rejecting the patriarchal family as the primordial unit, has set forth what may be called a "constructive" theory of uniform social progress. In the hands

[1] The brothers capture men for their sisters by way of reprisal and retaliation for stealing the latter: MUCKE, *Horde und Familie*, 125, 126, 111, 113 ff.

[2] But at first the man and the woman are merely slaves—there is no sexual or marriage relation whatever: *ibid.*, 117.

[3] *Ibid.*, 178–82. In the fourth and fifth *Abschnitte* (155–247) the author discusses the dissolution of the horde through the influence of the two forms of the family. The argument is involved and almost entirely *a priori*. It is nearly impossible to discover his conclusion as to whether a purely patriarchal or matriarchal family is differentiated in the process.

[4] MCLENNAN'S *Studies in Ancient History* appeared in 1876, being mainly a reprint of his *Primitive Marriage*, published January, 1865, four years later than Bachofen's book; but "it was in the spring of 1866," he says, "that I first heard of *Das Mutterrecht*."—*Studies*, I, 319.

MORGAN'S *League of the Iroquois* was published in 1851, and in this he describes some of the essential facts connected with his theory. In 1857, he re-examined the subject and enlarged his views (*Proceedings of the Am. Association for the Advancement of Science*, Part II). But it was not until 1871 that his great work on *Systems of Consanguinity* appeared, though accepted for publication, January, 1868. This was followed by the *Ancient Society*, 1877, in which his theory is fully elaborated. The *Houses and House-Life of the American Aborigines*, 1881, was originally intended as Part V of the *Ancient Society*.

of each marriage and the family are made to pass through an ascending series of phases for all mankind. Unquestionably valuable as are their contributions to the material of sociological science, seldom have there been seen more striking examples of hasty generalization than appear in the theoretical parts of their work.

This is particularly true of the theories of Morgan;[1] although in his *Systems of Consanguinity* he has with prodigious labor erected a monument of scientific research whose vast importance for the early history of human social relations is by no means yet definitively settled; and whose *Ancient Society*, aside from its speculative features, has the distinction of first clearly identifying the gentile organization of the Greeks and Romans with that of the red race of the western continents. Starting with the organization of society "on the basis of sex," as illustrated by the so-called class or group-marriages of the Australian Kamilaroi, he proceeds to discuss at length the gentile systems of the American Indians and the classic nations.[2] Originally relationship is traced in the female line, and intermarriage is prohibited within the *gens*. The *gens* is older than the monogamic family. It cannot have the family as its constituent unit, because it is composed, not of entire families, but of parts of families.[3]

The earliest phase of sexual relations among primitive men is promiscuity. Following this are five successive

[1] Referring to Lubbock's favorable view of Morgan's contributions to ethnological science, DR. STARCKE declares: "With all respect for Morgan's diligence as a collector of facts, I am more disposed to agree with McLennan that his work is altogether unscientific, and that his hypotheses are a wild dream, if not the delirium of fever."—*Primitive Family*, 207, 208. *Cf.* MCLENNAN, *Studies*, I, 269; LUBBOCK, *Origin of Civilization*, 162; and GROSSE, *Die Formen der Familie*, 3 ff. This criticism is far too severe; see KOHLER, *Zur Urgeschichte der Ehe*, 1 ff.; CUNOW, *Australneger*, chaps. v–vii, 11 ff.; HELLWALD, *Die mensch. Familie*, 158 ff.

[2] *Ancient Society*, 49–379; *Houses and House-Life*, 1 ff.

[3] *Ancient Society*, 227, 433 ff., 469. It is easy to see that this argument is fallacious, even when the rule of exogamy prevails. *Cf.* the criticism of STARCKE, *op. cit.*, 275–77; BOTSFORD, *Athenian Constitution*, 4–7.

stages or forms of marriage and the family, shading into each other, and each running a "long course in the tribes of mankind, with a period of infancy, of maturity, and of decadence."[1] Of these forms the first, second, and fifth are "radical," that is, each developing a distinct system of consanguinity. These systems of consanguinity "resolve themselves into two ultimate forms, fundamentally distinct." One is the *classificatory* and the other the *descriptive.* "Under the first, consanguinei are never described, but are classified into categories, irrespective of their nearness or remoteness in degree to *Ego;* and the same term of relationship is applied to all the persons in the same category." Under the second, which came in with monogamy and prevails among the Aryan, Semitic, and Uralian peoples, "consanguinei are described either by the primary terms of relationship or a combination of these terms, thus making the relationship of each person specific."[2] The classificatory systems of consanguinity, it should be carefully noted, are more tenacious than the forms of marriage, their nomenclatures often surviving long after the actual relationships they denote have ceased to exist.

The first form of the family in Morgan's series is the consanguine,[3] based on the intermarriage of brothers and sisters, own and collateral, in a group. Though now extinct, this form is thought once to have been universal, rude survivals being found even in the present century among the Hawaiians. But the evidence of its former existence upon which Mr. Morgan relies as conclusive is the Malayan

[1] *Ancient Society*, 389, and on the whole subject, 382–508. In his earlier work, *Systems of Consanguinity*, 480 ff., MR. MORGAN gives fifteen normal stages or institutions in the evolution of marriage and the family. See also the summary in MCLENNAN, *Studies*, I, 251, 252; and LUBBOCK'S elaborate discussion of Morgan, *Origin of Civilization*, 162 ff.

[2] *Ancient Society*, 394; *Systems of Consanguinity*, 10–15; LUBBOCK, *op. cit.*, 165.

[3] *Ancient Society*, 383 ff., 401–23; *Systems of Consanguinity*, 480 ff., 488 ff., where the term "communal family" is used.

system of consanguinity, which he assumes could only have been produced by it. This system is found among the Maoris, the Hawaiians, and other Polynesians. Anciently it may have prevailed generally in Asia; and it lies at the basis of the Chinese relationships. The Malayan system is classificatory. "The only blood-relationships are the primary," being comprised in five categories. These are parent, child, grandparent, grandchild, brother and sister. Thus consanguine marriage "found mankind at the bottom of the scale" of social progress.

In course of time, however, its evils were perceived and the second form of the family arose. This is the Punaluan,[1] resting on the intermarriage of several sisters in a group with each other's husbands; or on that of several brothers in a group with each other's wives; marriage between brothers and sisters not being permitted. "The Punaluan family has existed in Europe, Asia, and America[2] within the historical period, and in Polynesia within the present century," the most interesting example being afforded by the Hawaiians. It is an outgrowth of the consanguine family "through the gradual exclusion of own brothers and sisters from the marriage relation."[3] With it arose the organization into *gentes*, whose "fundamental rules" in the archaic form are exogamy and relationship in the female line. The Punaluan family co-operating with the gentile organization,[4] produced the Turanian or Ganowánian system of consanguinity, which is also classi-

[1] *Systems of Consanguinity*, 131 ff., 489, 490; *Ancient Society*, 424–52. The Hawaiian word *Pŭnalŭa* means "dear friend," "intimate companion": *ibid.*, 427.

[2] In forty North American tribes the former existence of the Punaluan family is thought to be proved by the Turanian system of consanguinity and by the right of the husband of the eldest sister to the younger sisters also: *Ancient Society*, 432, 436.

[3] *Ibid.*, 424.

[4] Since the rule of exogamy as respecting the *gens* would permit the intermarriage of brothers and sisters. For convenience McLennan's term "exogamy" is here used to indicate prohibition of marriage within the *gens*.

ficatory.[1] This is described by Morgan as "simply stupendous," recognizing "all the relationships known under the Aryan system, besides an additional number unnoticed by the latter."[2]

But forces were now operating within the Punaluan family which were destined to transform it. "From the necessities of the social state," there was more or less pairing from the first, "each man having a principal wife among a number of wives, and each woman a principal husband among a number of husbands." Moreover, the fuller development of the gentile organism, with its rule of exogamy, tended to foster a sentiment hostile to the intermarriage of near kindred and, in other ways, to produce a scarcity of women available for marriage within the Punaluan groups, thus leading to wife-capture and wife-purchase. Under these influences arose the Syndiasmian, or third general type of the family, based upon the marriage of single pairs, often temporary and without exclusive cohabitation. It is found among the Senaca-Iroquois and many other American tribes, among the Tamils of South India, and some other races of Asia.[3] This family did not produce a distinct system of consanguinity, the peoples having it still retaining the Turanian system.[4] The next, or Patriarchal, family, like the Syndiasmian, is "intermediate," not being "sufficiently influential upon human affairs to create a new, or modify essentially the then existing system of consanguinity."[5] It is found particularly among the Semites and Romans, and is characterized by the "organization of a

[1] *Systems of Consanguinity*, 131–382. But, curiously enough, among the peoples with the Punaluan family the Malayan system of consanguinity survived: *Ancient Society*, 426, 427, *passim*. *Ganowánians* are the American Indians, the word meaning "bow-and-arrow people": *Systems of Consanguinity*, 131. *Cf.* McLENNAN, *Studies*, I, 253, n. 1.

[2] *Ancient Society*, 387, 435 ff. In all more than two hundred relationships of the same person are recognized: *ibid.*, 436.

[3] *Ibid.*, 384 ff., 453–65. Called the "barbarian" family in *Systems of Consanguinity*, 490, 491.

[4] *Ancient Society*, 461. [5] *Ibid.*, 384, 465, 466; *Systems of Consanguinity*, 480, 491.

number of persons, bond and free, into a family under paternal power, for the purpose of holding lands, and for the care of flocks and herds." The Syndiasmian, and in a less degree the Patriarchal, constitute the transitional stage in the development of the Monogamic family. Its rise was especially fostered by the influence of property and the increase of the paternal power, leading to the change from the female to the male line of descent. It produced the system of consanguinity prevailing among the Uralian, Semitic, and Aryan peoples.[1]

Such, sketched in hasty outline, is the symmetrical structure which the author of the *Ancient Society* has erected. But it has not been able wholly to withstand the shock of adverse criticism. The argument rests on too narrow a basis of investigation, and it is sometimes contradictory in its details. Its real foundation is the assumption that the nomenclatures of the classificatory systems of relationship must necessarily denote actual relationships. The truth of this assumption, however, is not self-evident. Other explanations of their meaning, some of them simpler and far more probable, have been offered. In the first place, it is evident that Morgan was misled by Fison's account of the Kamilaroi class-marriages.[2] Only in Australia was he able to find in existence, as he believed, a social organization upon the basis of sex. Yet it is by no means established that communal or even group-marriage has ever prevailed among the Australian aborigines. The criticism of Mr. Curr has raised doubt as to the trustworthiness of Fison's theory, although it may not have entirely shattered it.[3] According to Curr, the

[1] *Ancient Society*, 468–97; *Systems of Consanguinity*, 492, 493, 3–127.

[2] Published by MORGAN in *Proceedings of the Am. Academy of Arts and Science*, for 1872; and subsequently presented in full by FISON in *Kamilaroi and Kurnai*, 50 ff., 99 ff., 159 ff., *passim;* MORGAN, *Ancient Society*, 49–61. Compare MCLENNAN'S account of Australian kinship in *Studies*, II, 278–310, especially 304 ff.

[3] CURR, *The Australian Race*, I, 106–42. *Cf.* also KEANE, *Man: Past and Present*, 154, 155; and CRAWLEY, *Mystic Rose*, 348, 476 ff.

class-system is an ingenious arrangement to prevent close intermarriages. Even first cousins may not marry.[1] The Australian is very jealous of his wife, who may be betrothed to him in childhood. Wife-lending occurs, but it is not sanctioned by custom. The use of a single word for different relationships, as for father and father's brother, is not an evidence of former group-marriage, but of "poverty of language."[2] Nevertheless the Australian nomenclature is richer in terms of relationship than has been assumed by Mr. Fison. "There is hardly an Australian vocabulary in print" in which distinct translation of terms for "uncle, aunt, nephew, niece, sister-in-law, and son-in-law" do not occur.[3]

Mucke, as we have already seen, explains the classificatory system as being a survival of the primitive "space-relationships" of the primitive horde.[4] By Kautsky also its origin is traced to the horde in which "hetairistic monogamy" prevailed, and in which blood-relationship with the parents was not regarded. The classes, therefore, have nothing to do with descent, but each embraces all the individuals of a single generation under a common name.[5]

On the other hand, McLennan, in his well-known controversy with Morgan,[6] insists that the system of nomenclature is merely a "system of mutual salutations," urging the fact that most of the peoples having it possess also "some well-defined system of blood-ties."[7] Yet he believes that the Malayan nomenclature, which lies at the basis of Morgan's classificatory system, "had its origin in some early marriage-

[1] CURR, *op. cit.*, I, 111, 112. [2] *Ibid.*, 116.

[3] *Ibid.*, 140. Compare the criticism of WESTERMARCK, *Human Marriage*, 56, 57.

[4] MUCKE, *Horde und Familie*, 31 ff., *passim*.

[5] KAUTSKY, "Entstehung der Ehe und Familie," *Kosmos*, XII, 194–98, 256.

[6] See *Studies*, I, 249–315; II, 304 ff.; and the reply of MORGAN, *Ancient Society*, 509 ff.

[7] *Studies*, I, 270, 271, 273.

law."[1] Starcke criticises this inconsistency,[2] and comes to the conclusion, after examination of the whole question, that the "nomenclature was in every respect the faithful reflection of the juridical relations which arose between the nearest kinsfolk of each tribe. Individuals who were, according to the legal point of view, on the same level with the speaker, received the same designation."[3] In substantial harmony with this opinion are the results of Westermarck's researches.[4] According to his view the classificatory nomenclatures are merely terms of address, used to denote the sex, relative age, or the "external, or social relationship in which the speaker stands to the person whom he addresses."[5]

These criticisms have not gone unchallenged. More recent and more detailed examination of the classificatory nomenclatures has thrown new light on their meaning; although their origin in promiscuity or "group-marriage" has not been conclusively established. Thus Cunow, who in general accepts the former existence of group-marriage among various peoples, and even finds traces of it in Australia,[6] denies

[1] *Studies*, I, 277. The form of marriage referred to is Nair polyandry. So the Turanian system is referable to Thibetan polyandry. *Cf.* MORGAN, *op. cit.*, 517 ff.

[2] *Primitive Family*, 181.

[3] *Ibid.*, 207, 171-208. STARCKE is criticised by CUNOW, *Australneger*, 165, for lack of thoroughness and consistency in his examination of the classificatory systems.

[4] *History of Human Marriage*, chap. v, 82 ff.

[5] *Ibid.*, 90. LUBBOCK, *Origin of Civilization*, 162-203, criticises Morgan's views as to the classificatory systems and concludes that the "terms for what we shall call relationships are, among the lower races of men, mere expressions for the results of marriage customs, and do not comprise the idea of relationship as we understand it; that, in fact, the connection of individuals *inter se*, their duties to one another, their rights, and the descent of their property, are all regulated more by the relation to the tribe than by that to the family; that, when the two conflict, the latter must give way" (202). TYLOR, *On a Method of Investigating the Development of Institutions*, 261-65, discovers a close relation between exogamy and the classificatory system. Thus out of fifty-three tribes with that system thirty-three observe the rule of exogamy (264).

[6] The so-called "Pirauru marriage" of the Dieri tribe (HOWITT, in *Trans. R. S. Victoria*, I, Part II, 1899, 96) and the "Dilpamali marriage" of the Kunandaburi tribe (CUNOW, *Australneger*, 163). Practically the same is the Piraungaru custom of the Urabunna tribe which SPENCER AND GILLEN, *Native Tribes of Central Australia*, 61 ff., regard as a "modified form of group-marriage."

that the Australian class-nomenclatures are derived from original group-relations;[1] nor are they, as Westermarck believes, ever employed as mere empty terms of polite or respectful address.[2] The class-systems arose in a very early recognition of three generations or stages of seniority, in order to hinder sexual relations between relatives in the ascending and descending line.[3] For this reason, and because of the existence among some backward tribes of significant terms of kinship, individual marriage must as a general rule have existed among the Australian natives from the "earliest times."[4] Thus, "in its original form," the author concludes, "the division into classes is a striking confirmation of Morgan's theory, that the first step in the development of systems of relationship consists in the prevention of sexual union between parents and children in the wide sense."[5] For the same reason it follows that intermarriage between the nearest collateral relatives may not have been excluded.

Much more radical are the conclusions reached by Kohler in the monograph in which, by a minute examination of Morgan's tables and other materials, he seeks to establish the genetic relations subsisting between "totemism, group-marriage, and mother-right," as they appear among the Dravidians, the Australians, and the American aborigines.

[1] CUNOW, *op. cit.*, 161, 163-65. [2] *Idem*, *Australneger*, 176.

[3] On the three *Altersclassen* or *Altersschichtungen*, see *ibid.*, 25 ff. The present class-system of the Kamilaroi, the author believes, is not older than the rise of the gentile organization. "Originally the division into classes by no means served, as Morgan and Fison assume, to exclude sexual intercourse between near collateral kindred, but to prevent cohabitation between relatives in the ascending and descending line, between parents and children, uncles and nieces, aunts and nephews, etc." *Cf.* as to the main point the somewhat similar views of HELLWALD, *Die mensch. Familie*, 158 ff.; LIPPERT, *Kulturgeschichte*, I, 81-83; and KAUTSKY, *Kosmos*, XII, 196-98.

[4] CUNOW, *op. cit.*, 161, 162: Among backward tribes parents are distinguished from parents' brothers and sisters; and own children from the children of own brothers and sisters.

[5] *Ibid.*, 25. See the somewhat similar conclusion of ATKINSON, *The Primal Law*, 280-94; and compare the criticism of CUNOW by LANG, *Social Origins*, 37, 112-18.

The researches of Curr and Westermarck are criticised as being too general and as lacking in rigid scientific method.[1] Abundant "survivals," such as the levirate, wife-lending, and, above all, the class-system, seem to demonstrate the former existence of group-marriage in Australia; and in the same way the same result is reached for the other peoples considered. The "key" to the problem is found in totemism, one of the most "formative and vitalizing impulses of mankind. In totemism lies the germ of the future family and state."[2] It is the characteristic feature of the social and religious life of the American Indians. From its very nature totemism favors the rise of mother-right and group-marriage. No person can belong to more than one totem, which is therefore of necessity exogamous. Choice must be made between the maternal and the paternal line—for totemism implies the blood-bond. This choice naturally leads directly to mother-right; since the relation of mother and child is the central fact in the genesis of social experience. The maternal system precedes the paternal, and no trustworthy examples of the opposite evolution have been discovered.[3] Furthermore, totemism leads straight to group-marriage. For if two totem-groups may intermarry, it follows that the "men of one totem may marry women of the other and *vice versa*." With kinship counted in the maternal line, this fact implies that a man may mate with his own daughter; while the union of mother and son or brother and sister would be excluded because of the identity of their totem.[4] Totemism is thus a means of differentiating matrimonial classes. "The whole history of group-marriage," the

[1] KOHLER, *Zur Urgeschichte der Ehe*, 3, 14 ff., 151 ff. This paper supplements the author's earlier *Recht der Australneger*, *ZVR.*, VII, 321 ff., 329 ff., 337 ff., where Fison's general conclusions are accepted and the literature cited.

[2] "Der Totemglaube gehört zu den bildensten, lebensvollsten, religiösen Trieben der Menschheit. In dem Totemismus liegt die künftige Familien- und Staatenbildung im Keime."—KOHLER, *op. cit.*, 27.

[3] *Ibid.*, 62.

[4] *Ibid.*, 39 ff., 41, 53 ff., 64, 65.

author concludes, "is a history of the restriction of marriage from totem to totem by the separation of under-totems through which marriage is subjected to definite conditions." Totemistic group-marriage appears to be the "starting-point" of social culture for all the races of mankind. Whether a more primitive stage of promiscuity may have preceded it, the author in this paper does not undertake to establish.[1]

Similar results are reached by Spencer and Gillen, who have given a remarkably clear and minute account of matrimonial, tribal, and totemistic institutions in central Australia. So far as the Australians are concerned, the theory that the classificatory nomenclatures are merely terms of address is positively rejected.[2] "When, in various tribes, we find series of terms of relationship all dependent upon classificatory systems such as those now to be described, and referring entirely to a mutual relationship such as would be brought about by their existence, we cannot do otherwise than come to the conclusion that the terms do actually indicate various degrees of relationship based primarily upon the existence of inter-marrying groups. . . . . Whatever else they may be, the relationship terms are certainly not terms of address, the object of which is to prevent the native having to employ a personal name. In the Arunta tribe, for example, every man and woman has a personal name by which he or she is freely addressed by others—that is, by any, except a member of the opposite sex who stands in the relationship of '*Mura*' to them, for such may only on very rare occasions speak to one another."[3] The fundamental idea of the Australian classes is "that the women of certain groups may marry the men of

[1] *Ibid.*, 65, 163, 164.

[2] SPENCER AND GILLEN, *Native Tribes of Central Australia*, 56.

[3] *Ibid.*, 56, 57. "A man can only marry women 'who stand in the relationship of *nupa*, that is, are children of his mother's elder brother's blood or tribal, or, what is the same thing, of his father's elder sister.'" The mother of a man's *nupa* is "*mura* to him and he to her, and they must not speak to one another." This applies to a possible mother, *i. e.*, the sister of the father: *ibid.*, 61, 62.

others." It is a device for limiting and defining the intermarriage of persons supposed to be of common blood.[1]

Crawley likewise holds that the terms of the classificatory systems "are terms of kinship and not terms of address;" although being "in origin terms of *relation*," so far they are "terms of address also." For "all of the terms can be used as terms of address, just as our terms of relationship can be so used." The classificatory system, in some cases, appears clearly as a device to assist nature in confining marriage within the same generation.[2]

The results of the most recent research, therefore, seem to have advanced our knowledge of the early social condition of mankind; but not to have definitively settled the problem of the former existence of communistic marriage. One rises from an examination of the literature relating to totemism and to the classificatory systems of relationship with a feeling that much more material must be gathered and exploited before we shall escape entirely from the domain of speculation as to their full meaning.[3]

[1] *Op. cit.*, 58.

[2] *Mystic Rose*, 473, 474.

[3] In general on the Australian class-systems see further, TYLOR, *Early History of Mankind*, 288; WAKE, *Marriage and Kinship*, chap. iv; KOVALEVSKY, *Tableau*, 13 ff.; LUBBOCK, *Origin of Civilization*, 104 ff., BERNHÖFT, in *ZVR.*, IX, 6 ff.; MCLENNAN, *Studies*, II, 304 ff., where the reports of Grey, Ridley, and other observers are summarized; GROSSE, *Die Formen der Familie*, 49 ff., 58 ff., who, in the main, accepts Curr's conclusions; DAWSON, *Australian Aborigines*, 1, 2, 26–40; FOREST, "Marriage Laws of N. W. Australia," *Report 2d Meeting of Aust. Association Adv. Sci.* (1890), 653, 654; FISON, "Group-Marriage and Relationships," *ibid.*, *4th Meeting* (Tasmania, 1893), 688–97, criticising Westermarck, 717–20, criticising McLennan; MATHEW, "Australian Aborigines," *Jour. R. S. N. S. Wales*, XXIII, 335–49, criticising Morgan and McLennan. Consult also the references in the Bibliographical Note at the head of the chapter.

For further discussion of Morgan's researches see BERNHÖFT *Verwandtschaftsnamen und Eheformen*; POSADA, *Théories modernes*, 52–57; SCHROEDER, *Das Recht in der geschlechtl. Ordnung*, 18 ff.; CUNOW, *Australneger*, v–vii, 11 ff.; GROSSE, *op. cit.*, 3 ff.; HELLWALD, *Die mensch. Familie*, 158 ff.; BEAUCHAMP, "Aboriginal Communal Life in America," *Am. Antiquarian*, IX, 343–50, attacking Morgan's views, holding that proper communism is not found among the red Indians; GIRAUD-TEULON, *Les origines du mariage*, 92–101, 169 ff.; FISON AND HOWITT, *Kamilaroi and Kurnai*, 99, 101, 149, 316 ff., who, for the Australian groups, sustain Morgan as opposed to McLennan; WAKE, *op. cit.*, 15, 19, 112, 266 ff., 297 ff.; LETOURNEAU, *L'évolution du mariage*, 432, 433, who accepts Morgan's five forms of the family; KOVALEVSKY, *op. cit.*, 9, 10;

III. McLENNAN'S CONSTRUCTIVE THEORY

McLennan's theory[1] starts also with man in a condition, as he conceives it, resembling that of other gregarious animals. The unions of the sexes are "probably, in the earliest times, loose, transitory, and in some degree promiscuous."[2] There is no idea of consanguinity, though men may always have been held together by that "feeling of kindred" which arises in "filial and fraternal affection."[3] Everywhere when society emerges from this condition kinship is traced in the female line. Originally paternity is uncertain,[4] hence the recognition of relationship through the mother must of necessity have preceded the parental and the agnatic systems;[5] and this order of development is never reversed.

MAINE, *Early Law and Custom*, 195 ff., *passim*; PESCHEL, *Races of Man*, 224, 228 ff., who rejects Morgan's conclusions; LUBBOCK, "Development of Relationships," *Jour. Anth. Inst.*, Feb., 1871.

[1] *Studies in Ancient History*, I, viii, 83–146. McLennan's views are somewhat modified and further developed in his *Patriarchal Theory*, notably in chaps. xii and xiii, 181–242; and a mass of new material is presented in his *Studies*, 2d ser. (1896).

[2] In his two earlier works McLennan is vague as to the exact meaning of "promiscuity" and "polyandry;" but in his letter to Darwin (1874), *Studies*, II, 50–56, he defines these terms, so that, in effect, he makes important concessions to the adherents of early monogamy and polygyny and to those critics who have questioned his theory of universal phases of progress. He says, referring to the first series of *Studies*: "The import of my reasoning is that more or less of it [promiscuity] and of *indifference* must appear in the hordes or their sections or some of them." It is used to "denote the general conduct as to sexual matters of men without wives. . . . . Now I agree with you that from what we know of human nature we may be sure that each man would aim at having one or more women to himself, and cases would occur wherein for a longer or shorter time the aim would be realized, and there would be instances of what we may call polygyny and monogamy—your first stage. . . . . I take it, polygyny, monogamy, and polyandry (or its equivalents) must have occurred in every district from the first;" but the cases of polyandry would be much more numerous. "Polyandry, in my view, is an advance *from*, and *contraction* of, promiscuity. It gives men wives. Till men have wives they may have tastes, but they have no obligations in matters of sex. You may be sure polygyny in the early stage never had the sanction of *group opinion*." This late explanation does not, however, relieve the author from responsibility for the misleading statements or obscurities of his earlier works. *Cf.* the rather too appreciative review of the second series of *Studies* by PROFESSOR GIDDINGS, in *Annals of the Am. Academy*, IV, 97–100.

[3] *Studies*, I, 83, 88–90.

[4] *Ibid.*, chap. viii.

[5] On the three systems of kinship see POST, *Familienrecht*, 6 ff.

Though the "filial and fraternal affections may be instinctive," they are "obviously independent of any theory of kinship, its origin or consequences; they are distinct from the perception of the unity of blood upon which kinship depends; and they may have existed long before kinship became an object of thought." Such a group may have been held together chiefly "by the feeling of kindred;" but the "apparent bond of fellowship . . . . would be that they and theirs had always been companions in war or the chase—joint-tenants of the same cave or grove."[1] Slowly the idea of blood-relationship arose; and eventually observation led to a recognition of the system of kinship through the mother. Further than this, so long as paternity remained uncertain, primitive men could not go. For the theory in question, therefore, the maternal system of kinship existing in the homogeneous "group-stock" is the social fact of fundamental importance. But primitive man was rude, ignorant, relatively helpless. "Before the invention of the arts, and the formation of provident habits, the struggle for existence must often have become very serious. The instincts of self-preservation, therefore, must have frequently predominated." Society would tend toward one common type in which there was little place for the "unselfish affections." In this "struggle for food and security" the balance of the sexes would be disturbed. "As braves and hunters were required and valued, it would be to the interest of every horde to rear, when possible, its healthy male children." The weaker sex must obey the cruel law requiring the "survival of the fittest." Hence arose the common, perhaps general, practice of female infanticide.[2] The result of this disturbance of the balance of the sexes, caused by

[1] McLENNAN, *op. cit.*, I, 83, 84.

[2] *Ibid.*, 90, 91, 75–77; II, 77–80. After the appearance of totem groups, infanticide would be checked by the blood-feud: *ibid.*, I, 145.

female infanticide, was a series of customs or phenomena of great sociological interest, requiring notice in the order in which they are supposed to have arisen.

1. The natural consequence of the diminution in the number of women was to enhance their relative importance. Every woman would now have several wooers. Rivalry was fierce and "unrestrained by any sense of delicacy from a copartnery in sexual enjoyments." Quarrels and divisions within the horde would be of frequent occurrence. "These were the first wars for women, and they went to form the habits which established exogamy." But, if complete social disintegration would be avoided, self-preservation required a compromise. A rearrangement in smaller hordes took place; and so "we arrive at last at groups within which harmony was maintained through indifference and promiscuity;" where women, "like other goods," were held in common; and "children, while attached to mothers," belonged to the horde.[1] We have reached in fact, as the first result of female infanticide, the "totem *gens*" or group of totem kindred, having a common name, taken from some plant, heavenly body, or animal, whose image is sometimes tattooed upon their bodies, and which is sometimes revered as an ancestor, sometimes as an ancestral god.[2]

[1] *Ibid.*, 91–93.

[2] On totemism see McLENNAN, *Patriarchal Theory*, 206, 207, 227–29, 230–36; *Studies*, II, 368 ff., *passim;* MORGAN, *Ancient Society*, 49 ff., who gives many facts relating to totem *gentes* among the American Indians and elsewhere; WAKE, *Marriage and Kinship*, Index; FISON AND HOWITT, *Kamilaroi and Kurnai*, 40–49, 165–71, who criticise LUBBOCK, *Origin of Civilization*, 210, 338 ff., 263; STARCKE, *Primitive Family*, 20 ff., 29 ff., *passim;* TYLOR, *Primitive Culture*, I, 42, 213, 215. WESTERMARCK, *Human Marriage*, chap. ix, denies that tattooing is fundamentally connected with totemism, and holds that it is a form of ornamentation to serve as a means of sexual attraction. *Cf.* MUCKE, *Horde und Familie*, 77; PLOSS, *Das Weib*, I, 94 ff.; 196 ff.; BACHOFEN, *Mutterrecht*, 335; FRASER, *Totemism; idem*, *Golden Bough*, III, 416 ff.; CRAWLEY, *Mystic Rose*, 249, 398, 457, 470; HELLWALD, *Die mensch. Familie*, 190 ff.; FLETCHER, "A Study from the Omaha Tribe," *Procds. A. A. A. S.*, XLVI, 325–34; *idem*, "Emblematic Use of the Tree in the Dakotan Group," *ibid.*, XLV, 191–209; especially KOHLER, *Zur Urgeschichte der Ehe*, 27 ff.; and SPENCER AND GILLEN, *Native Tribes of Central Australia*, containing the best and fullest account of the Australian forms of the institution.

2. The next institution originating in scarcity of women is polyandry, a form of sexual relations which, by the adherents of the horde-theory, is regarded as the earliest type of the family, properly so called: a family resting upon marriage, that is, upon a courtship "of men and women, protected by public opinion."[1] It is of special interest, because in its progressive phases it is held to be the medium of transition from the maternal to the parental and agnatic systems of kinship; and, therefore, through the aid of contract in the form of wife-purchase, to modern conceptions of the marriage relation. Polyandry is represented as a universal phase of social evolution, constituting the first general modification of promiscuity.[2] Of this there are two principal forms with intermediate stages. In Nair[3] polyandry, the lowest type, we find a condition of sexual relations closely bordering upon the grossest communism. The "wife lives not with her husbands, but with her mother or brothers;" and, under certain "restrictions as to tribe and caste," she is free to choose her husbands or lovers, these not being necessarily related to each other. Here kinship

[1] For McLENNAN's best statement as to the nature and prevalence of polyandry see his interesting letter to Darwin, *Studies*, II, 50–56, already mentioned.

[2] *Ibid.*, I, 93 ff., 97, 133 ff.; II, 47–56; *Patriarchal Theory*, 267 ff. In general, on polyandry, see MARSHALL, *A Phrenologist amongst the Todas*, 190–232; STARCKE, *op. cit.*, 128–40, 77 ff., *passim;* SMITH, *Kinship and Marriage*, 121 ff., 277–79; FISON AND HOWITT, *op. cit.*, 144 ff.; WAKE, *op. cit.*, 134–78, Index; GIRAUD-TEULON, *Origines du mariage*, 150 ff., 434 ff.; WESTERMARCK, *op. cit.*, chaps. xx–xxii, 3, 115–17, 547–49; MAYNE, *Hindu Law and Usage*, 60 ff.; SPENCER, *Principles of Sociology*, I, 672–81, 641 ff.; LUBBOCK, *Origin of Civilization*, 79, 143 ff.; SCHMIDT, *Jus primae noctis*, 35, 36, 319, 320; POST, *Familienrecht*, 54–63; *idem*, *Afrikanische Jurisprudenz*, I, 40, 303; *idem*, *Die Geschlechtsgenossenschaft*, 16 ff.; LETOURNEAU, *L'évolution du mariage*, 40, 49, 90–109; MASON, *Woman's Share in Primitive Culture*, 221, 222; MAINE, *Early Law and Custom*, 106, 123, 200; FRIEDRICHS, "Ursprung des Matriarchats," *ZVR.*, VIII, 371 ff.; *idem*, "Familienstufen und Eheformen," *ibid.*, X, 257, 258; MUCKE, *op. cit.*, 181–38; KAUTSKY, "Entstehung der Ehe und Familie," *Kosmos*, XII, 258, 264, 344–48; BERNHÖFT, in *ZVR.*, IX, 12 ff.; KOHLER, *op. cit.*, 143; GROSSE, *Die Formen der Familie*, 117 ff.; HELLWALD, *op. cit.*, 241–61; SCHNEIDER, *Die Naturvölker*, II, 459 ff.; ACHELIS, *Entwicklung der Ehe*, 28 ff.; ELLIS, in *Pop. Sci. Monthly*, Oct., 1891.

[3] McLENNAN believes this form to be wide-spread. It is found in Ceylon, among the Kasias and Saporogian Cossacks, and elsewhere. The higher and lower forms often appear together among the same people: *Studies*, I, 99 ff. "Beena" marriage of Ceylon is believed to be a modification of their polyandry.

and inheritance are, of course, in the female line. "No Nair knows his father, and every man looks upon his sister's children as his heirs."[1] In a transitional stage the wife has a home of her own, cohabiting with her husbands according to fixed rules. The highest type of polyandry is found in Tibet; and in this case there is a close approach to the essential elements of the modern family. The wife lives in the home of her husbands, who are near relatives, usually brothers. It is the prerogative of the eldest brother to choose the wife. All the children are assumed to belong to him, and, as a matter of fact, the first-born is usually known to be his. Paternity therefore is not entirely uncertain, while the father's blood is always known.[2] The same type of polyandry, somewhat more advanced, appears among the Dravidian Todas of India. Here monogamy and polyandry exist side by side. One man, for example, may have a wife exclusively his own, while his brothers may choose one in common. Usually when one brother has taken a woman to wife, and paid the dower to her parents, the other brothers or very near relatives, all living together, may gain the rights of husbands, "if both he and she consent," by simply providing their respective shares of the dower, which almost invariably consists of from one to four buffaloes.[3] According to Marshall, "no females, whether married or single, possess property; but, under all circumstances of life, are supported by their male relations, being fed from the common stock." When "a father dies, his personal property is divided equally among all his sons. If the deceased, being an elder brother,

[1] BUCHANAN, *Journey*, II, 594; MCLENNAN, *op. cit.*, I, 102. *Cf.* on the Nairs, GIRAUD-TEULON, *op. cit.*, 150–64; STARCKE, *op. cit.*, 83–87, 133 ff.; SMITH, *Kinship and Marriage*, 122; LETOURNEAU, *op. cit.*, 99–101.

[2] *Cf.* SPENCER, *Principles of Sociology*, I, 676, 677.

[3] MARSHALL, *op. cit.*, 210. According to FRAU JANSSEN (*Globus*, XLIII, 371), it is the custom for the "young wife to become the spouse of *all* the brothers of her husband; her first child counts as that of the eldest brother, the second as that of the second, and so forth." *Cf.* HELLWALD, *op. cit.*, 246.

should have no sons, his next brother inherits all the property. All children of both sexes belong to the father's family; and inheritance runs through the male line only. Thus (1) if a widow should re-marry, her sons by both marriages have claims on their respective father's property. (2) If one or more women are in common to several men, *each* husband considers *all* the children as his—though each woman is mother only to her own—and each male child is an heir to the property of all of the fathers." Moreover, there exists a kind of levirate. "In order to avoid the complications that would arise, in the matter of food and the guardianship of property, from the re-marriage of widows, if they entered other families taking their children with them, either a brother or other near relation of her deceased husband takes her to wife." She "remained in the family" is the Toda expression.[1] "Now if we consider that one or more brothers may each become the husband of separate wives by virtue of having each paid a dower, and that younger brothers as they grow to age of maturity, and other brothers as they become widowed, may each either take separate wives or purchase shares in those already in the family, we can at once understand that any degree of complication in perfectly lawful wedded life may be met with, from the sample of the single man living with a single wife to that of the group of relatives married to a group of wives. We begin to see also why tribes following polyandrous habits endeavor to prevent further complications by making widows 'remain in the family.'" It follows that economic motives even here are influential in molding matrimonial institutions. The same motives, the scarcity of subsistence, are likewise the main cause of the very extended female infanticide which widely prevailed previous to 1822,

[1] MARSHALL, *op. cit.*, 206, 207. To be a *barudi* or widow or a *baruda* or widower is a term of reproach: *ibid.*, 208.

when the Madras government "put a pressure on the Todas, in order to impel them to forsake their murderous practice." It was formerly the habitual custom to smother "all daughters in every family, except one or sometimes two."[1] The Todas are an in-and-in breeding people. "Although there *are* degrees of kinship, within whose limits the union of the sexes is held in actual abhorrence, yet half brothers and sisters are not included amongst the objectionables."[2]

Accordingly, through polyandry, it is held, the transition to the parental or paternal system of kinship becomes possible, and sooner or later it usually takes place. Among the Todas father-right is fully established. In Tibet the inheritance goes to the brothers in the order of birth; and, failing these, to their eldest son, who, as already seen, is often known to be the eldest brother's child. This rule, it is maintained, may readily lead to agnation. Nevertheless the primitive custom of mother-right was very tenacious. Resisted by the gentile organization and the blood-feud, the transition was slow and painful. It was facilitated by contract and initiation.[3] A woman might be bought with the understanding that the children should belong, not to her own clan, but to that of her husband. Or, when contract alone was not sufficient to overcome the resistance of religion and the blood-feud, the same result might be obtained by purchase, followed by initiation into the sacred rites of the husband's kindred.[4] Moreover, as in Tibet and among the Todas, wife-purchase

[1] *Ibid.*, 111, 196, 213.

[2] *Ibid.*, 221. In this regard as in many others the Todas resemble the Veddahs: SARASIN, *Die Weddas von Ceylon*, I, 465-67. For a good account of polyandry among the Todas and other peoples see HELLWALD, *op. cit.*, 241 ff., 246 ff.

[3] On wife-purchase and initiation, as a means of transition to the paternal system, see MCLENNAN, *Patriarchal Theory*, 232-38.

[4] Thus, in Guinea, according to Bosman, in ordinary marriages, even when the wives were purchased, the children belonged to the mother. "It was customary, however, for a man to buy and take to wife a slave, a friendless person . . . . and consecrate her to his Bossum or god." In this case the "children would be born of his kindred and worship."—BOSMAN, *Description of Guinea*, 161; MCLENNAN, *op. cit.*, 235, 236.

or its survival is sometimes found in connection with polyandry.[1]

McLennan believes that Tibetan polyandry has been nearly, if not quite, universal, and that it is an "advance upon the Nair type." Many evidences of its alleged actual existence in present and former times are adduced; and where the institution is not found reliance is placed upon the presence of certain customs, such as the Niyoga, or the "appointed daughter," of the Hindus, the Hebrew levirate, and the inheritance by brothers, which are held to be its survivals.[2]

3. The disparity in the number of women would next produce the custom of wife-capture. The normal condition of primitive men is assumed to be that of strife.[3] Women would naturally be sought as the most valuable of the spoils of war. This would lead to polygyny. Since there can be

[1] MASON, *Woman's Share in Primitive Culture*, 222; ROCKHILL, *Land of the Lamas*, 213, 339; MARSHALL, *op. cit.*, 210 ff., 217, 219.

[2] An "appointed daughter" is one assigned by contract in marriage to bear an heir to her father who has no son. In the Niyoga a son is begotten upon the wife, in the lifetime of the husband, by a person appointed for that purpose. The levirate and other like expedients existed also among the Hindus: *Ordinances of Manu*, IX, 53, 57–69, 97, 143 ff.: BURNELL AND HOPKINS, 253 ff.; "Gautama," *Sacred Books of the East*, II, 267 ff.; MAYNE, *Hindu Law and Usage*, chap. iv; MCLENNAN, *Patriarchal Theory*, 268, 286 ff.; LEIST, *Alt-arisches Jus Gentium*, 122, 123; JOLLY, *The Hindu Law of Partition*, 144–66; *idem*, *Rechtliche Stellung der Frauen bei den alten Indern*, 36–38 (levirate). For the Hebrew form of the levirate, see Deuteronomy 25:5–11, where the brother is required to "perform the duty of an husband's brother to the widow." The book of Ruth contains many illustrations of primitive family custom. SIR HENRY MAINE, *Early Law and Custom*, chap. iv, regards the Niyoga, the levirate, and similar expedients for supplying a male heir, as fictions, under the influence of the worship of male ancestors, for maintaining the agnatic family. J. D. Mayne explains the Niyoga on the theory that the lord and owner of the wife is the lord of the child, physical paternity not being essential; and the levirate is an extension of the Niyoga. MCLENNAN, *op. cit.*, 266–339, criticises the theories of the two last-named writers. See also KOHLER, *Zur Urgeschichte der Ehe*, 153; HELLWALD, *Die mensch. Familie*, 262, 274, 470; SCHNEIDER, *Die Naturvölker*, I, 25; II, 461; ACHELIS, *Entwicklung der Ehe*, 36 ff.; REDSLOB, *Die Levirats-Ehe bei den Hebräern*, 1 ff.; STARCKE, *Primitive Family*, 141–58, 159–70 (inheritance by brothers); SPENCER, *Principles of Sociology*, I, 679–81; LETOURNEAU, *L'évolution du mariage*, chaps. xii, xv; FISON AND HOWITT, *Kamilaroi and Kurnai*, 146, 147; WAKE, *Marriage and Kinship*, 171–78, 436 ff.; especially WESTERMARCK, *Human Marriage*, 3, 510–14, who cites the literature. Various examples are mentioned in *ZVR.*, III, 394–407, 419, 420; VI, 280 (Germany); VIII, 242; X, 81; XI, 237.

[3] MCLENNAN, *Studies*, I, 23, 72, 73, *passim*.

no certainty as to fatherhood where the practice of seizing the women from hostile tribes obtains, wife-capture is the means of maintaining the system of counting kinship through the women only; and the existence of that system, at some time, must be inferred wherever wife-capture or its form in the marriage ceremony is discovered.

4. Wife-capture leads directly to exogamy, or the rule of not marrying within the group of recognized kindred; that is, at first, among those having the same totem. Exogamy is therefore not regarded as the result of a prejudice against intermarriage of those related by blood. For a time, doubtless, marriage within and without the group was practiced indifferently, as pleasure or opportunity favored. But eventually the possession of a foreign woman was looked upon as the more honorable or respectable; and so at last marriage within the kindred was entirely forbidden. With the rise of wife-capture the original homogeneity of the group gave place to a growing heterogeneity. Soon many alien stocks were represented in the horde. Where polygyny existed, or where several wives were taken in succession, the same family might comprise children representing several totems. These children like their mothers were counted as foreigners. Thus a modified form of exogamy arose. "So far as the system of infanticide allowed, the hordes contained young men and women accounted of different stocks, who might intermarry consistently" with the original rule of exogamy. "Hence grew up a system of betrothals, and of marriage by sale and purchase." But the effect of the system of kinship through males, when it superseded the maternal system, was to "arrest the progress of heterogeneity," and to "restore the original condition of affairs among exogamous races, as regards both the practice of capturing wives and the evolution of the forms of capture."[1]

[1] *Ibid.*, I, 127–40, 50–71.

It would be ungrateful not to acknowledge freely the service which McLennan and his adherents have rendered to the social history of mankind. They have brought to light a mass of very important facts which it is highly beneficial for us to know. It cannot be denied that wife-capture, exogamy, and the custom of taking kinship from the mother have very widely prevailed among primitive races. It is not so certain, however, that the right explanation of their origin or of their relation to one another has been given. In the first place, criticism, notably that of Herbert Spencer,[1] has detected fatal weakness and inconsistency in the argument by which Mr. McLennan has sought to establish his theory. It is doubtful, for instance, whether female infanticide has been so important a factor in social evolution.[2] But, granting that it has generally prevailed, it is hard to

[1] *Principles of Sociology*, I, 641 ff. In general for criticism and summary of McLennan's views see MORGAN, *Ancient Society*, 509–21; MAINE, *Early Law and Custom*, 106 ff., 123, 124, 150, 192–228; GIRAUD-TEULON, *Origines du mariage*, 102 ff., *passim*; SMITH, *Kinship and Marriage*, 80, 118, 121, 129 ff., 230; FISON AND HOWITT, *Kamilaroi and Kurnai*, 23 ff., 67, 101 ff., 130 ff.; LUBBOCK, *Origin of Civilization*, 102, 109, 130, 143 ff., *passim*; SCHURMAN, *The Ethical Import of Darwinism*, chap. vi; MASON, *Woman's Share in Primitive Culture*, chap. x; STARCKE, *Primitive Family*, 94 ff., 128 ff., 141 ff., *passim*; WAKE, *Marriage and Kinship*, 14 ff., 58 ff., 134 ff., 253 ff., 297 ff., *passim*; *idem*, "Primitive Family," *Jour. Anth. Inst.*, August, 1879; KAUTSKY, in *Kosmos*, XII, 258 ff.; WESTERMARCK, Index; SPENCER, *Various Fragments*, 70 ff.; GOMME, "Primitive Human Horde," *Jour. Anth. Inst.*, XVII, 118–33; who is criticised by WAKE, "Primitive Human Horde," *ibid.*, November, 1887, 276 ff.

[2] Such is the view of LUBBOCK, *Origin of Civilization*, 103, 129, 134, 135; WESTERMARCK, *Human Marriage*, 466, 472, 473, 547; FISON AND HOWITT, *op. cit.*, 133 ff., 171 ff., 190, 357; WAKE, *Marriage and Kinship*, 75 ff. "It is not proved that the tribes which practice child-murder put to death the female infants by preference."—STARCKE, *op. cit.*, 131 ff. Such is also the opinion of FISON AND HOWITT, *loc. cit.*; LUBBOCK, *op. cit.*, 103; DARWIN, *Descent of Man*, II, 364, 591–93; and GIRAUD-TEULON, *op. cit.*, 110–16. See also SMITH, *Kinship and Marriage in Early Arabia*, 129, 130, 279–85; FRIEDRICHS, "Familienstufen," *ZVR.*, X, 219–37; PLOSS, *Das Kind*, II, 243–64; *idem*, *Das Weib*, I, 250, 251; GROSSE, *Die Formen der Familie*, 36; SCHNEIDER, *Die Naturvölker*, I, 297 ff.; MARTIN, *Hist. de la femme*, 3 ff.; and various examples in *ZVR.*, VII, 355, 374; IX, 14 ff. (Todas); X, 122; XI, 427 (Kamerun); BROUARDEL, *L'infanticide* (Paris, 1897); MARSHALL, *A Phrenologist amongst the Todas*, 108 ff., 190 ff.; NELSON, "The Eskimo about Bering Strait," in *XVIII. Rep. of Bureau of Eth.*, Part I, 289; CHAMBERLAIN, *The Child*, etc., 110 ff.

In his second series of *Studies*, 74, 111, MCLENNAN defends his view as to the prevalence of female infanticide and presents a mass of facts relating to it among many peoples. FARRER, *Early Wedding Customs*, 224, denies that infanticide is the cause of exogamy.

see how this would greatly disturb the "balance of the sexes." For "tribes in a state of chronic hostility are constantly losing their adult males, and the male mortality so caused is usually considerable. Hence the killing many female infants does not necessitate lack of women: it may merely prevent excess." McLennan's fundamental "assumption is therefore inadmissible."[1] Again it is held that female infanticide, "rendering women scarce, led at once to polyandry within the tribe, and the capturing of women from without." But "where wife-stealing is now practiced it is commonly associated with polygyny;"[2] while conversely, polyandry does not "distinguish wife-stealing tribes," such as the Tasmanians, Australians, Dakotas, and Brazilians. "Contrariwise, though it is not a trait of peoples who rob one another of their women, it is a trait of certain rude peoples who are habitually peaceful;" for instance, the Eskimo, "who do not even know what war is." Furthermore, if wife-capture and exogamy are at once practiced by a cluster of adjacent tribes, the scarcity of women would not be relieved. Inevitably the weaker tribes would "tend toward extinction;" and in the meantime, if a part only of their female infants were killed, they must deliberately "rear the remainder for the benefit" of their enemies.[3] Nor, as Starcke has pointed out, is there anything in a "scarcity of women which could lead a community accustomed to promiscuous intercourse to adopt polyandry; on the contrary, such a scarcity would make it more difficult to set limits" to promiscuity. "Marriage, or the exclusive possession of one

[1] SPENCER, *op. cit.*, I, 646.

[2] *Ibid.*, 646, 647. But McLennan meets this difficulty by insisting that wife-stealing, among polyandrous peoples would lead to polygyny on the part of the most successful. This would also explain the inconsistency alleged by SPENCER (648) that polygyny and polandry sometimes coexist, as among Fuegians, Caribo, Eskimo, Warrens, Hottentots, and the ancient Britons. See MCLENNAN, *Studies*, I, 145, 146; and *cf.* POST, *Familienrecht*, 62.

[3] SPENCER, *op. cit.*, I, 649.

woman by one or more men, would become more easy in proportion to the increase in the number of women, since the conflict between the lusts of the men would necessarily become less intense."[1] McLennan believes that exogamy has "been practiced at a certain stage among every race of mankind;" and that endogamy, or the custom of marrying within the kindred, is a "form reached through a long series of social developments."[2] Yet, inconsistently with this, he admits that "the separate endogamous tribes are nearly as numerous, and they are in some respects as rude, as the separate exogamous tribes." He goes even farther, declaring that among a variety of tribes, belonging to "one and the same original stock," endogamy and exogamy are found existing side by side.[3]

Such are some of the results gained simply from an examination of the reasoning of McLennan. They have been here enumerated, not only because they afford an excellent illustration of the extreme complexity of social problems, but also because they may warn us against the perils of hasty speculation. It is not merely in matters of detail that the doctrine of the horde and promiscuity has met with resistance. Its very foundations have recently been powerfully assaulted by the adherents of a totally different view of the origin and development of the human family. How the phenomena of marriage and kinship will appear when seen in a new light, we shall next try to discover.

[1] *Primitive Family*, 132. Other objections are brought forward by this able writer. "It has been suggested that the motive for the murder of female infants is the fear of becoming the object of the predatory instincts of other tribes; whence we must conclude that the tribe which keeps its women alive is tolerably strong; those tribes which lack women cannot, therefore, obtain them by violence to any great extent. It also seems to be a strange thing to kill the female infants from a dread of being exposed to attack, and at the same time to seek to increase the number of women by carrying them off by violence from other tribes."—*Ibid.*, 132.

[2] SPENCER, *op. cit.*, I, 644.

[3] MCLENNAN, *Studies*, I, 78-80, 124, 142-45, 147 ff.; II, 57 ff. *Cf.* his article on "Exogamy and Endogamy," *Fortnightly Review*, XXI, 884 ff., where he seems to waver somewhat in his conclusions on this point.

CHAPTER III

THEORY OF THE ORIGINAL PAIRING OR MONOGAMOUS FAMILY

[Bibliographical Note III.—The theory of the pairing family is not so much the result of a reaction against the theory of promiscuity as it is a consequence of the perception that the problems of society can only be solved by appealing to the laws of human life and organic evolution. Hence Starcke's highly original *Primitive Family* (New York, 1889), and Westermarck's more elaborate and very able treatise on *Human Marriage* (London and New York, 1891), showing the influence in some passages of Starcke's acute reasoning, may fairly be regarded as epoch-making. Important also are Wake's *Marriage and Kinship* (London, 1889) and Letourneau's *L'évolution du mariage* (Paris, 1888), which is supplemented by his *Sociology Based upon Ethnology* (London, 1893). These writers have carried farther the suggestions of Darwin, *Descent of Man* and *Animals and Plants under Domestication;* and Spencer, *Principles of Sociology* (New York, 1879), who had already thrown doubt upon the communistic theory. A similar general conclusion is reached in the valuable monograph of Kautsky, "Entstehung der Ehe und Familie," in *Kosmos*, XII (Stuttgart, 1882), whose original "hetairism" is but "defective monogamy;" and Peschel's *Races of Man* (London, 1889) tends in the same direction. Hildebrand likewise rejects the communistic theory in his inaugural address on *Das Problem einer allgemeinen Entwicklungsgeschichte des Rechts und der Sitte* (Graz, 1894); and this work should be read in connection with his *Recht und Sitte auf den verschiedenen wirthschaftlichen Kulturstufen* (Jena, 1896). On the other hand, Kulischer, in "Die geschlechtliche Zuchtwahl bei den Menschen in der Urzeit," in *ZFE.*, VIII, defends original communal marriage against the views of Darwin. Of special value, likewise, for this chapter are Grosse, *Die Formen der Familie* (Freiburg and Leipzig, 1896); which is favorably examined by Cunow, "Die ökonomischen Grundlagen der Mutterherrschaft," in *Neue Zeit*, XVI; Keane, *Ethnology* (2d ed., Cambridge, 1896); *idem, Man: Past and Present* (Cambridge, 1899); Frerichs, *Naturgeschichte des Menschen* (2d ed., Norden, 1891); Bagehot, *Physics and Politics* (London, 1872); as are also the works of Posada, Crawley, Lang, and Hellwald elsewhere mentioned.

For the family among the lower animals in addition to Letourneau, Hellwald, and Westermarck, consult Brehm, *Tierleben* (Leipzig and

Vienna, 1891); his *Bird-Life* (London, 1874); Herman Müller, *Am Neste* (Berlin, 1881); Schäffle, *Bau und Leben des socialen Körpers* (Tübingen, 1881); Espinas, *Des sociétés animales* (2d ed., 1878); Groos, *Die Spiele der Thiere* (Jena, 1896), or the English translation (New York, 1898); and Wagner, "Die Kulturzüchtung des Menschen gegenüber der Naturzüchtung im Tierreich," in *Kosmos*, 1886, I. In this connection read also Houzeau, *Études sur les facultés mentales des animaux* (Mons, 1872); Vignoli, *Ueber das Fundamentalgesetz des Intelligenz im Tierreiche* (Leipzig, 1879); and Salt, *Animals' Rights* (New York, 1894).

On the problems of sex and kinship mentioned in the text see Geddes and Thompson, *Evolution of Sex* (New York, n. d.); Ellis, *Man and Woman* (London, 1896); Finck, *Primitive Love* (New York, 1899), vigorously attacking some of Westermarck's theories; his *Romantic Love and Personal Beauty* (London, 1887); Duboc, *Psychologie der Liebe* (Hannover, 1874); Mantegazza, *Physiologie der Liebe* (30th ed., Berlin, 1897); Klebs, *Verhältniss des männ. und weibl. Geschlechts in der Natur* (Jena, 1894); Schroeder, *Das Recht in der geschlechtl. Ordnung* (Berlin, 1893); Thomas, "Relations of Sex to Primitive Social Control," and his "Difference in the Metabolism of the Sexes," both in *Am. Journal of Sociology*, III (1898); Sadler, *The Law of Population* (London, 1830); Starkweather, *The Law of Sex* (London, 1883); Hofacker and Notter, *Uber die Eigenschaften . . . . welche sich auf die Nachkommen vererben* (Tübingen, 1827); Ploss, *Das Weib* (Leipzig, 1895); also his *Ueber die das Geschlechtsverhältniss der Kinder bedingenden Ursachen* (Berlin, 1859); Schenk, *Einfluss auf das Geschlechtsverhältniss* (3d ed., Magdeburg and Vienna, 1898); the brilliant monograph of Düsing, *Die Regulierung des Geschlechtsverhältnisses* (Jena, 1884); Huth, *Marriage of Near Kin* (2d ed., 1887); Lewkowitsch, "Die Ehen zwischen Geschwisterkindern and ihre Folgen," in *ZFE.*, VIII; and Mitchell, "Blood-Relationship in Marriage," in *Mem. of London Anth. Society*, 1865, II, 402 ff.

Several important points are treated in Tylor's *Early History of Mankind* (New York, 1878); and in his *Method of Investigating Institutions*. See also Kovalevsky, *Tableau des origines et de l'évolution de la famille* (Stockholm, 1890); Swinderen, *De Polygynia* (Groningae, 1795); and for a curiosity, read Premontval, *La monogamie* (1751). In general, the literature cited in Bibliographical Note II has been used, and so need not here be described.]

I. THE PROBLEM OF PROMISCUITY

THE researches of several recent writers, notably those of Starcke and Westermarck, confirming in part and further developing the earlier conclusions of Darwin and Spencer,

have established a probability that marriage or pairing between one man and one woman, though the union be often transitory and the rule frequently violated, is the typical form of sexual union from the infancy of the human race. The problem is not yet fully worked out; but if in the end the theory of original promiscuity must be abandoned, and the pairing or monogamous family accepted as the primitive social unit, it is not because of the spiritual and moral superiority of man, as compared with other animals, but because sexual communism as a primitive and general phase of life appears to be inconsistent with the biological, economic, and psychological laws which have determined the general course of organic evolution. Strongly supported and highly probable as is the pairing or monogamic theory, it must be clearly understood in the outset that it is still only a theory and has not yet reached the stage of demonstration. It will hardly do, however, to set aside the researches of its adherents as being superficial and devoid of real scientific method; for the champions of the opposite doctrine of primitive communism are nothing if not daring, and their sweeping generalizations often rest solely on comparatively few "survivals" of alleged conditions which are absolutely "prehistoric."[1]

It may be impossible to prove that there ever was a uniform primitive state. "So long as we are within the sphere of experience," says Starcke, "we cannot begin by assuming that there was at any time only a single human community. Experience begins with a plurality of communities, and the single community of which we are in search must be found on the indeterminate boundary between man and animals."[2]

[1] Among the great living investigators in this field no one, perhaps, has sinned more frequently in making hazardous generalizations than KOHLER, who is particularly harsh in his criticism of Westermarck, Curr, and other adversaries. See, for example, his *Zur Urgeschichte der Ehe*, 2 ff., 150 ff.

[2] *Primitive Family*, 7, 8.

Indeed, it seems certain that if we are ever to understand the character of the earliest forms of human marriage and the human family, we must begin by studying the family and marriage as they exist among other and less advanced members of the animal world.[1] Biology, declares Letourneau, is the starting-point of sociology.[2] In this view Starcke coincides. "We have no reason to regard the social life of man as a recent form. Not only do the same psychical forces which influence gregarious man also influence the gregarious animal; probability also leads us to infer that the primitive communities of mankind are derived from those of animals. Since man in so many respects only goes on to develop the previous achievements of animal experience, it may be supposed that he made use of the social experience of animals as the firm foundation of his higher advancement." Besides, "there are human communities which are far less firmly established than those of animals;" and "it may even be asserted that the social faculty is positive in animals and negative in man," for man is "less subservient to instinct."[3] "If we want to find out the origin of marriage," says Westermarck, "we have to strike into another path, the only one which can lead to the truth, but a path which is open to him alone who regards organic nature as one continued chain, the last and most perfect link of which is man. For we can no more stop within the limits of our own species, when trying to find the root of our psychical and social life, than we can understand the physical condition of the human race without taking into consideration that of the lower animals."[4]

[1] See LETOURNEAU, *L'évolution du mariage*, chap. ii, on "Le mariage et la famille chez les animaux;" and his *Sociology*, 327-30, 380-82.

[2] *L'évolution du mariage*, chap. i.

[3] STARCKE, *op. cit.*, 8, 9.

[4] *Human Marriage*, 9. See also *ibid.*, chap. iii, on the "Antiquity of Human Marriage."

Accordingly three principal arguments against the existence at any time of a general state of promiscuity have been advanced:

First is the so-called zoölogical argument, based on a comparison of the sexual habits and institutions of animals with those of the lowest races of men. In the outset it is important to observe that the physical differentiation of the sexes is itself a product of the struggle for existence. This important fact is made the starting-point of the argument by which Hellwald[1] finds the elements of the human mother-group and of mother-right in earlier animal experiences. Among the lowest members of the animal kingdom there is no individual distinction of sex. That first makes its appearance when the "artistically constructed organism, in order to sustain itself in the process of evolution, is called upon to perform a wider series of functions." Thus "when an animal is forced to greater exertion, when it must work in order to exist, when unresistingly it can no longer suffer the stream of events to press upon it, but withstands it and seeks in it to follow its own course, then the separation of the sexes appears, and, indeed, as a division of labor created by nature for the purpose of developing species." With further evolution, male and female characteristics become more pronounced, in response to the special functions which each sex is called upon to perform. The same process continues in the case of man. To see in him anything other than the "highest and foremost representative of the animal world, one must be drunk with metaphysical nectar, and nothing is better fitted than comparative physiology to humble one's pride in this regard." For man's entire physical organization is "homologous to that of the higher species of animals." Accordingly, the lower a group of men stands on the ladder of culture, the less marked is the

[1] *Die mensch. Familie*, 4 ff.

"bodily differentiation of the sexes." Among various backward peoples there is relatively slight difference in outward appearance between the men and the women.[1] The growth of sexual variation in physical structure keeps pace exactly with progress in civilization. This progress depends mainly on two original forces. Of these "without doubt the mightiest is hunger," the need of nourishment. For everywhere on earth the "first thought and striving" of living beings is the "stilling of hunger." Next to the struggle for food, the sexual and pairing impulse is the most potent factor in the genesis of society. The former influence, it is important to observe, is the more constant and the more imperative. The latter grows and becomes more acute with increase in refinement and the consequent development of the nervous system.[2] It follows that in the origin of social institutions the erotic or pairing impulse, however important, is a less cogent genetic force than the economic necessity of a food supply.

The lives of the lower animals reveal a great variety of sexual relations. The lowest form, and perhaps the most frequent, is that of unlimited promiscuity.[3] Among the invertebrates the preservation of the young is left almost wholly to chance. The duties of the parents are limited mainly to the functions of reproduction. "In the lowest

[1] Among the aborigines of New Britain, according to POWELL, *Unter den Kannibalen von Neubritannien*, 123; and among the Lacondou Indians of Central America, according to CHARNAY, *Les anciennes villes du nouveau monde*, 399. "Negro women of unmixed blood seldom have voluptuous figures, and in anatomical structure they resemble the men in a remarkable way, so that seen from a distance they are scarcely to be distinguished from them. The same is true for a whole series of low races."—HELLWALD, *op. cit.*, 6.

[2] "Bedenken wir die vielen Mittel, die gerade die Civilisation hierzu bietet, so dürfte dem befremdenden Urteile nicht mehr zu widersprechen sein, dass bei wirklichen Naturvölkern und unter normalen sozialen Verhältnissen der erotische Antrieb ein beschränkterer sei, als auf höheren Stufen der Civilisation."—LIPPERT, *Geschichte der Familie*, 29, 30. Among the highly civilized of our own times the nervous system is very greatly developed, and therewith the capacity for sexual pleasure is proportionately increased; see HELLWALD, *op. cit.*, 11 ff., 128, and the literature there cited.

[3] *Ibid.*, 22.

classes of vertebrata, parental care is likewise almost unheard of." It "rarely happens that both parents jointly take care of their progeny."[1] But the chelonia, or tortoise group, are "known to live in pairs;" and here we reach, among animals, the first trace of the family, properly so called. "The chelonia form, with regard to their domestic habits, a transition to the birds, as they do also from a zoölogical and, particularly, from an embryological point of view." Who that has experienced the keen delight afforded by watching the domestic habits of birds, from the building of the nest to the teaching of the young to make the first wavering trial of its wings, cannot bear witness to the high development of marriage and the family among them? The great work of Brehm supplies abundant evidence of their human-like social life.[2] "Parental affection," summarizes Westermarck, "has reached a very high degree of development, not only on the mother's side, but also on the father's. Male and female help each other to build the nest, the former generally bringing the materials, the latter doing the work. In fulfilling the numberless duties of the breeding season both birds take a share. Incubation rests principally with the mother, but the father, as a rule, helps his companion, taking her place when she wants to leave the nest for a moment, or providing her with food and protecting her from every danger. Finally, when the duties of the breeding season are over, and the result desired is obtained, a period with new duties commences. During the first few days after hatching, most birds rarely leave their young for long, and then only to procure food for themselves and their family. In cases of great danger, both parents bravely defend their offspring. As soon as the first period of helplessness is over,

[1] WESTERMARCK, *op. cit.*, 9 ff.

[2] BREHM, *Tierleben: Allgemeine Kunde des Tierreichs* (10 vols., Leipzig and Vienna, 1891). Vols. IV–VI are devoted to birds. See also his *Bird-Life* (London, 1874).

and the young have grown somewhat, they are carefully taught to shift for themselves; and it is only when they are perfectly capable of so doing that they leave the nest and the parents."[1] The bird family is usually monogamic, and the marriage is lasting. Birds are generally faithful to the marriage vow; and this is particularly true of the females.[2] "With the exception of those belonging to the gallinaceous family, when pairing," they do so "once for all till either one or the other dies.[3] And Dr. Brehm is so filled with admiration for their exemplary family life that he enthusiastically declares that 'real genuine marriage can only be found among the birds.'"[4]

With the lower mammals the union of the sexes is generally of short duration, often only for a single birth, though in several species the parents remain together even after

[1] WESTERMARCK, *op. cit.*, 11; *cf.* BREHM, *op. cit.*, IV, 19 ff., *passim;* and HERMAN MÜLLER'S *Am Neste*, which Brehm has used.

[2] DARWIN, *Animals and Plants under Domestication*, II, 81, speaks of pigeons as being "true to their wedding-vow." On polygyny and monogamy among animals see *idem*, *Descent of Man*, 216 ff. "Many mammals and some few birds are polygamous, but with animals belonging to the lower classes I have found no evidence of this habit. The intellectual powers of such animals are, perhaps, not sufficient to lead them to collect and guard a harem of females" (216, 217). Birds sometimes lose the pairing "instinct" under domestication (220). Regarding the "marital virtue" of birds, see HELLWALD, *op. cit.*, 30.

[3] "Abweichend von anderen Tieren leben die meisten Vögel in geschlossener Ehe auf Lebenszeit und nur wenige von ihnen, gleich den Säugetieren, in Vielweiberei oder richtiger Vielehigkeit, da eine Vielweiberei einzig und allein bei den Straussen stattzufinden scheint. Das Pärchen, welches sich einmal vereinigte, hält während des ganzen Lebens treuinnig zusammen, und nur ausnahmsweise geschiet es, dass einer der Gatten die Gesetze einer geschlossenen Ehe missachtet." But since there are more males than females, the husband often has to fight for the retention of his wife, though in exceptional cases she aids him in repelling the aggressor. The wife is sometimes too ready to follow the victor, and in some cases the widow is very easily consoled. "Vögel, deren Männchen getötet wurde, waren schon eine halbe Stunde später wieder verehelicht; der zweite Gespons wurde ebenfalls ein Opfer seiner Feinde: und dieselben Weibchen nahmen ohne Bedenken flugs einen dritten Gatten an. Die Männchen legen gewöhnlich viel tiefere Trauer um den Verlust ihrer Gattin an den Tag, wahrscheinlich aber nur weil es ihnen ungleich schwerer wird als den Weibchen, wieder einen Ehegenossen zu erwerben."— BREHM, *op. cit.*, IV, 20, 21. For very interesting examples of marriage and the family among birds, see HELLWALD, *op. cit.*, 26 ff., 38; and compare WUNDT, *Menschen und Thierseele*, 448 ff.; and ESPINAS, *Des sociétés animales*, 417 ff., 439.

[4] BREHM, *Bird-Life*, 324; WESTERMARCK, *op. cit.*, 11, 482, 502.

the arrival of the young. But among the higher members examples of monogamic marriage are not infrequent, such being the case with animals of prey.[1] As a rule, the quadrumana live in pairs. Gorillas, however, are said sometimes to be polygynous. "According to Dr. Savage, they live in bands, and all his informants agree in the assertion that but one adult male is seen in every band."[2] But monogamy is perhaps most common. M. du Chaillu declares that he found "almost always one male with one female, though sometimes the old male wanders companionless."[3] The orang-utan and the chimpanzee, like the gorilla, also live in families.[4] Of a truth, promiscuity is far from universal in the pre-human stage.

Yet it would be easy to overestimate the value of the argument based upon the sexual relations of the lower animals. But it will not do with Kohler and Lippert to set it aside as entirely irrelevant.[5] Upon the precedents afforded by "anthropomorphic" species in particular, as Hellwald justly insists, no "slight weight should be placed;" for these are "not merely the highest organized animals, but they must also be regarded as the nearest animal relatives of man."[6] Indeed, the transition from the family as it exists among the quadrumana to that of the least-developed races of man is not abrupt, although the lowest examples of mankind yet observed are advanced beyond the supposed primitive human stage. The broad characteristics

[1] HELLWALD, *op. cit.*, 25, 26.

[2] *Description of Troglodytes Gorilla*, 9 ff.; WESTERMARCK, *op. cit.*, 13.

[3] DU CHAILLU, *Explorations and Adventures in Equatorial Africa*, 349; WESTERMARCK, *op. cit.*, 14. But see HELLWALD, *op. cit.*, 23.

[4] *Cf.* DARWIN, *Descent of Man*, 108, 217 ff., 590, 591, who is cautious in his statement as to the rule among the quadrumana. KAUTSKY, "Entstehung der Ehe und Familie," *Kosmos*, XII, 198 ff., gives some interesting illustrations of marriage among animals; and see ESPINAS, *op. cit.*, 444 ff.; ATKINSON, *Primal Law*, 219-25.

[5] KOHLER, *Zur Urgeschichte der Ehe*, 6, 7; LIPPERT, *Kulturgeschichte*, I, 72, 73.

[6] HELLWALD, *op. cit.*, 26, 27.

of the one are the characteristics of the other. The "relations of the sexes are, as a rule, of a more or less durable character." There is conjugal affection. The immediate care of the children belongs to the mother. "Among mammals as well as birds," declares Espinas, "maternal love is the corner-stone of the family."[1] The father is the protector and provider, although paternal love is more slowly developed. Like the male among the lower animals, savage or barbarous man may be "rather indifferent to the welfare of his wife and children, ... but the simplest paternal duties are, nevertheless, universally recognized. If he does nothing else, the father builds the habitation, and employs himself in the chase and in war."[2]

But the argument for the pre-human origin of the elements of marriage and the family does not rest merely upon precedents of sexual habits. It is based rather upon the entire experience of animals in the hard struggle for existence. That struggle, as Hellwald suggests, forced upon them primarily the problem of food-supply, the need of a sort of economic co-operation, more lasting in its results than the pairing instinct. It is the entire social, mental, and moral product of animal experience, of living together, so well described among others by Espinas, Schäffle, Groos, and Wundt, which man in some measure inherited as a rich legacy from his humbler predecessor.[3] Accordingly Westermarck believes that marriage was probably "transmitted to

[1] *Op. cit.*, 444; *cf.* HELLWALD, *op. cit.*, 40–42.

[2] WESTERMARCK, *op. cit.*, 14–19. HILDEBRAND, *Ueber das Problem einer allgemeinen Entwicklungsgeschichte*, 23 ff., maintains the existence of monogamy in what he holds to be the first culture-stage, that of the chase. A similar result is reached by MUCKE, *Horde und Familie*, 59 ff., *passim*: KAUTSKY, *op. cit.*, 190 ff.; GROSSE, *Die Formen der Familie*, as above summarized.

[3] For the social systems among animals, even insects, see SCHÄFFLE, *Bau und Leben des socialen Körpers*, 20 ff.; WUNDT, *Menschen und Tierseele*, 369 ff., 447 ff.; GROOS, *Spiele der Thiere*, 147 ff., 162 ff., 230 ff.; and especially ESPINAS, *op. cit.*, 207 ff., 274 ff., 458 ff., 543 ff. Compare HOUZEAU, *Étude sur les facultés mentales des animaux*; and the other authors on this subject cited in Bibliographical Note III.

man from some ape-like ancestor, and that there never was a time when it did not occur in the human race."[1] With Starcke, and in harmony with the view of Hellwald already quoted, he holds that marriage and the family cannot rest upon the sexual impulse alone. This is too transitory. Among animals it is obvious that "it cannot be the sexual instinct that keeps male and female together for months and years," for the "generative power is restricted to a certain season;" and it seems highly probable that among men a pairing season prevailed in ancient times. Thus the "wild Indians of California, belonging to the lowest races on earth," are said to "have their rutting seasons as regularly as have the deer, the elk, the antelope, or any other animals."[2] According to Powers, the California Kabinapek "are extremely sensual. In the spring when the wild clover is lush and full of blossoms and they are eating it to a satiety after the famine of winter, they become amorous. This season, therefore, is a literal Saint Valentine's Day with them, as with the natural beasts and birds of the forest."[3] The Tasmanians, the Australian Watch-an-dies, and various other peoples appear to show evidences of the same habit.[4] Vignoli reaches a similar conclusion. "The family union in which man originally finds himself is not an essentially human but likewise an animal fact, since that mode of common social life is found with the greater part of animals and always

[1] *Op. cit.*, 20; *cf.* KEANE, *Ethnology*, 9, taking the same view.

[2] SCHOOLCRAFT, *Indian Tribes*, IV, 224.

[3] POWERS, *Tribes of California*, 206. Similar evidence is furnished by Corbusier: "For two years in succession I observed that in August and September the women solicited the attentions of the men, and an unusual number of couples were seen with their heads hidden in a blanket caressing each other. The majority of the children were born in the spring."—"The Apache-Yumas and Apache-Mojaves," *Am. Antiquarian*, VIII, 330.

[4] WESTERMARCK, *op. cit.*, 20, 24–38, cites the literature. On the pairing seasons among men and animals, see also HELLWALD, *op. cit.*, 127 ff.; KULISCHER, in *ZFE.*, VIII, 149 ff.; and MUCKE, *op. cit.*, 67 ff. The pairing season appears to be the result of natural selection, a device of nature to make sure that the young shall be born at a time most favorable to their sustenance and survival.

among the higher. It is the necessity of rearing the young which unites the parents and gives them a common life for a shorter or longer period; indeed in some species this marriage of love and care continues throughout their whole existence. Hence the fact of family sociality is not an exclusive product of humanity, but of the universal laws of the whole animal life upon the earth. Let it not be asserted that in man affection between the sexes and toward their offspring . . . . is more active, more intense, and more lasting; for it manifests itself with equal strength and sometime with equal duration between animals and toward their young. Thus man loves, cohabits, and lives socially in a primitive family community only because he is an animal and moreover an animal higher in the organic series. So the fact of the family is consummated according to the necessity of cosmic laws governing a great part of the reproductive and social activity of the animal kingdom."[1]

According to Starcke, "we are in some respects disposed to underestimate the great influence which sexual matters exert on all the concerns of social life, and the attempt is sometimes made to sever it from moral life, as a matter of which we are constrained to admit the practical existence, although, from the ideal point of view, it ought not to be. On the other hand, its influence on primitive communities has been greatly overrated." The sexual instinct, however powerful, is "devoid of the conditions which form the basis of the leading tendencies in which man's struggle for existence must be fought out." Hence primitive marriage does not rest upon the tender sentiment which we call love,[2] but "as hard and dry as private life itself," it has its "origin in the most concrete and prosaic requirements." The "com-

[1] VIGNOLI, *Ueber das Fundamentalgesetz des Intelligenz im Thierreiche:* translated from HELLWALD, *Die mensch. Familie*, 42.

[2] Compare the interesting chapter of HELLWALD, "Kuss und Liebe," *op. cit.*, 97–120.

mon household," he continues, "in which each had a given work to do, and the common interest of obtaining and rearing children were the foundations upon which marriage was originally built."[1] Therefore, according to this view, marriage appears to be a kind of contractual relation from the beginning.[2] The conclusions of Westermarck on this point are in substantial harmony with those of Starcke: "The prolonged union of the sexes is, in some way or other, connected with parental duties. . . . . The tie which joins male and female is an instinct developed through the powerful influence of natural selection." This instinct as well as parental affection are "thus useful mental dispositions which, in all probability, have been acquired through the survival of the fittest." So he concludes that "it is for the benefit of the young that male and female continue to live together. Marriage is therefore rooted in family, rather than family in marriage."[3] Hence it is that among many peoples "true conjugal life does not begin before a child is born;" and there are other races who "consider that the birth of a child out of wedlock makes it obligatory for the parents to marry."[4]

[1] *Primitive Family*, 241, 242, 268, and the whole of chap. vii, of the second division of the work, in which he gives the results of the researches comprised in the preceding chapters. *Cf.* DARGUN, *Mutterrecht und Vaterrecht*, 17, 18, who favors Starcke's view as against HELLWALD, *op. cit.*, 457; also LIPPERT, *Geschichte der Familie*, 118, who takes a similar position.

[2] "The family is therefore distinguished from the family group and the clan as a group of kinsfolk established by contract, and only in a subsidiary sense by the tie of blood between parents and children."—*Op. cit.*, 13. With Starcke's view compare that of Posada, who uses the suggestive word *symbiose* (*convivencia*) to express the totality of influences concerned in the origin of society. He says: "En somme, d'après tout ce qui vient d'être dit, la société humaine ne peut pas être considérée comme ayant eu la famille pour origine. A la force *instinctive* du sang, au fait nécessaire et primitif de l'union sexuelle, il faut ajouter et combiner la *symbiose*, qui tend à devenir territoriale, et résulte du besoin fondamental de la conservation: elle implique la coopération universelle et la vie de relation, déterminée par le plaisir, par la sympathie, par la nécessité de faire face aux exigences d'autres hommes; elle implique aussi la coopération universelle, non plus de mari à femme, ni de père à fils, mais d'homme à homme."—*Théories modernes*, 99, 100, 96, 81 ff., *passim*.

[3] WESTERMARCK, *op. cit.*, 20–22.

[4] *Ibid.*, 22 ff., 379, 535. On these customs, often taken as evidences of former promiscuity, compare LIPPERT, *Geschichte der Familie*, 6, 7; and the examples in *ZVR.*, V, 353; XI, 135, 136.

As a result of the first argument, then, marriage appears as a fundamental institution, whose beginnings are anterior to the dawn of human history. But there is need of a new definition, one broad enough to satisfy the demands of science. For most existing definitions are of a "merely juridical or ethical nature, comprehending either what is required to make the union legal, or what, in the eye of an idealist, the union ought to be." Hence Westermarck defines marriage, from a scientific point of view, as a "more or less durable connection between male and female, lasting beyond the mere act of propagation till after the birth of offspring;" and Starcke, in like spirit, declares that marriage in the widest sense is "only a connection between man and woman which is of more than momentary duration, and as long as it endures they seek for subsistence in common."[1]

The second or physiological argument may be very briefly stated. It rests upon the evidence, referred to by Sir Henry Maine, that promiscuous intercourse between the sexes "tends nowadays to a pathological condition very unfavorable to fecundity; and infecundity, amid perpetually belligerent savages, implies weakness and ultimate destruction."[2] Thus Dr. Carpenter, "who visited the West Indies before the abolition of slavery, well remembers the efforts of the planters to form the negroes into families, as the promiscuity into which they were liable to fall produced infertility, and

[1] WESTERMARCK, *op. cit.*, 19, 20; STARCKE, *op. cit.*, 13. FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 253–56, accepts Starcke's conception of marriage, but finds his definition inadequate. He offers the following: "Eine von der Rechtsordnung anerkannte und privilegirte Vereinigung geschlechtsdifferenter Personen, entweder zur Führung eines gemeinsamen Hausstandes und zum Geschlechtsverkehr, oder zum ausschliesslichen Geschlechtsverkehr." *Cf.* HEUSLER, *Institutionen*, II, 271–76, on the distinction between *Familie* and *Sippe*. "Die Familie des Rechtes," he says, "ist nicht ein Verband von Blutsverwandten sondern eine Gemeinschaft der Hausgenossen;" but the *Sippe* (*gens*) is based on blood-relationship (271). He combats the view of ROSIN, *Der Begriff der Schwertmagen*, § 5. Hellwald, as already seen, prefers the term "mother-group" for the so-called primitive family; and does not find marriage proper until the stage of property and full "mother-right" is reached; see chap. ii.

[2] *Early Law and Custom*, 204, 205; *cf.* also WESTERMARCK, *op. cit.*, 115–17.

fertility had become important to the slave-owner through the prohibition of the slave-trade."[1] Again "it is a well-known fact that prostitutes very seldom have children, while, according to Dr. Roubaud, those of them who marry young easily become mothers."[2] Furthermore, as Westermarck urges, "in a community where all the women equally belonged to all the men, the younger and prettier ones would of course be most sought after, and take up a position somewhat akin to that of the prostitutes of modern society."[3] Nor is the objection, that "the practice of polyandry prevails among several peoples without any evil results as regards fecundity being heard of," insuperable. For "polyandry scarcely ever implies continued promiscuous intercourse of many men with one woman;" and where it exists the relations of the woman with her husbands is often so regulated as to make the union practically monogamous.[4] In this connection also should be considered the infertility and other evils resulting from the intermarriage of near kindred.[5] For in a state of promiscuity such unions must have been very frequent; and at one stage of social development, if the theory of Morgan were to be accepted, they must have constituted the general rule.

According to Westermarck, the strongest objection to ancient promiscuity "is derived from the psychical nature of man and other animals."[6] The third or psychological

[1] *Early Law and Custom*, 204, 205, note.

[2] WESTERMARCK, *op. cit.*, 115; MANTEGAZZA, *Die Hygiene der Liebe*, 405; *cf.* MAINE, *op. cit.*, 204.

[3] *Op. cit.*, 115.

[4] *Ibid.*, 115-17. Thus in Tibet but one of the husbands was usually at home; and among the Todas betrothals are made with the condition that each of the husbands should live with the wife a month by turns: *ibid.*, 116.

[5] See the elaborate investigation of WESTERMARCK, *op. cit.*, chaps. xiv, xv, especially 334 ff.

[6] *Ibid.*, 117-33, 495, 551. With this passage should be read his extremely interesting chapters on the "Courtship of Man," the "Means of Attraction," "Liberty of Choice," "Sexual Selection among Animals," "Sexual Selection of Man; Typical Beauty," and the "Law of Similarity."

argument therefore alleges the universal prevalence of sexual jealousy among the races of men.[1] Darwin declares that this passion is found among all male quadrupeds with which he is acquainted; and comes to the conclusion, therefore, that "looking far enough back in the stream of time, and judging from the social habits of man as he now exists, the most probable view is that he aboriginally lived in small communities, each with a single wife, or if powerful with several, whom he jealously guarded against all other men."[2] That jealousy is unknown among "almost all uncivilized peoples" is, indeed, asserted by many adherents of the horde theory.[3] But a mass of evidence relating to savage and barbarous races in all parts of the world shows that such assertions are without foundation. In many tribes the suspected wife is exposed to the vengeful fury of the jealous husband. For example, among the California Indians, according to Powers, "if a married woman is seen even walking in the forest with another man than her husband she is chastised by him;" and "a repetition of the offense is generally punished with speedy death."[4] So "among the Creek 'it was formerly reckoned adultery, if a man took a pitcher of water off a married woman's head and drank of it.'"[5] Women, we are told, are held in little esteem among the Innuit on the coast of Labrador; yet "the men are very jealous," and death is often the penalty for adultery on the part of either spouse.[6]

[1] FINCK, *Primitive Love*, 87 ff., criticises Westermarck's view, presenting a mass of facts to prove the absence of true jealousy among low races.

[2] *Descent of Man*, 591; *cf.* WESTERMARCK, 117; and KAUTSKY, 194 ff. On jealousy among animals, see HELLWALD, *Die mensch. Familie*, 23, 37.

[3] LE BON, *L'homme et les sociétés*, II, 293; WESTERMARCK, *op. cit.*, 117; *cf.* GIRAUD-TEULON, *Origines du mariage*, 71.

[4] *Tribes of California*, 412.

[5] ADAIR, *History of the American Indians*, 143; WESTERMARCK, *op. cit.*, 119. *Cf.* KLEMM, *Kulturgeschichte*, II, 80, who finds evidence in both Americas of male jealousy among the natives.

[6] "Although the men are very jealous of the favors of their wives, and incontinence on the part of the latter is certain to be more or less severely punished, the male offender, if notoriously persistent in his efforts to obtain forbidden favors, is

Magalhães, who visited "more than a hundred villages" among "thirty tribes" of Brazilian natives, some of them "already half civilized and others still entirely free from any participation in our institutions, ideas, and pre-conceived notions," records as a result of his observations that "there exists in the Indian family all grades from institutions strict to a degree exceeding anything history tells us about down to the community of women. . . . . Thus I know tribes where there is no marriage, and I know others in which a woman committing adultery is punished by being burned."[1] Moreover, he emphatically warns us that he is speaking here of the "uncatechised" native, not yet demoralized by missionary influence.[2] According to Dobrizhoffer, the Abipones of Paraguay are conspicuous for "conjugal fidelity;" and they are very jealous, taking swift vengeance when infidelity is suspected.[3] Souza, who "lived in Brazil, in what is now the state of Bahia, from 1570 to 1587,"[4] says that "there are always jealousies among" the wives of the polygamous

usually killed by the injured lover or husband." Separations are often caused by jealousy.—TURNER, "Ethnology of the Ungava District," *XI. Rep. Bureau of Eth.*, 178, 188, 189. *Cf.* KRAUSE, *Die Tlinkit Indianer*, 221, who says the "betrayer of a woman, if he escapes the dagger of the offended husband, must pay for his offense with presents. If, however, he is a relative, he takes the position of a subordinate husband (*Nebenmann*) and must help contribute to the support of the woman."

[1] JOSÉ VIEIRA DE MAGALHÃES, "Familia e religião Selvagem," in his "Ensais de Anthropologia, Região e Raças Selvagens," published in *Revista Trimensal do Instituto . . . . do Brasil*, XXXVI, 108 ff. The passages quoted here and elsewhere from Magalhães are given in the translation made for the author by Professor J. C. Branner. The reports of MARTIUS, *Ethnographie*, I, 112, 115, 116, 119, 120; *idem*, *Rechtszustande*, 59, 63, 64, 66–68, seem to confirm that of Magalhães.

[2] "I refer," he says, "to the uncatechised Indian, for the catechised one is, as a rule, a degraded being. Whether the system of catechising is bad, or whether in the efforts directed especially toward making a religious man, the development of the eminently social ideas of free labor is forgotten, or whether it is something else, the fact is this: the catechised Indian is a degraded man, without original customs, indifferent to everything and consequently to his wife and almost to his family."

[3] "Of the Weddings and Marriages of the Abipones," in his *Account of the Abipones*, II, 213. Dobrizhoffer was eight years among this people during his stay in South America, 1749–67.

[4] I am indebted to Professor J. C. Branner for a translation of the passages here and elsewhere quoted from Souza and Anchieta, as also for the dates.

Tupinambás, especially on the part of the first wife, because usually she is "older than the others and less gentle."[1] On the other hand, the Jesuit Anchieta, who was in the same country "from 1553 until his death in 1597," declares that women frequently abandon their consorts to take other men "without any feeling upon the part of the husbands; and I never saw and never heard of any Indian killing any of his wives on account of any feeling about adultery;" but his narrative reveals unmistakable evidence of the existence of sexual jealousies.[2]

In fact, among primitive peoples, as suggested by the preceding examples, death or other severe punishment is often the penalty for adultery. It is so in Polynesia, although the fault of the man is usually "condoned;"[3] as also in Micronesia, where the husband does not escape so easily.[4] Extraordinary precautions are sometimes taken to prevent marriage with an impure bride. Frequently the husband requires that the "woman he chooses for his wife shall belong to him, not during his life-time only, but after his death." Hence the widespread practice of sacrificing the

[1] SOUZA, "chap. clii, which treats of the manner of marriages of the Tupinambas," in his "Tratado descriptivo do Brazil em 1587," *Revista Inst. Hist.*, XIV, 311 ff.

[2] JOSÉ D'ANCHIETA, "Informação dos Casamentos dos Indios do Brazil," *Revista Trimensal de Hist. e Geog.*, VIII, 254–62. "At most," he continues, "they beat the one guilty of adultery if they can, and he bears it patiently, knowing what he has done, except in case he is some great chief, and the woman has no father or strong brothers of whom he is afraid." Then the author relates how a "great chief," Ambirem, cruelly put a wife to death for adultery; but this act and others of the same sort he ascribes to the influence of the French, whom the good priest evidently does not like.

[3] AVERY, "Races of the Indo-Pacific Oceans," *Am. Antiquarian*, VI, 366. The death penalty also appears in New Zealand: RUSDEN, I, 21.

[4] WAITZ, *Anthropologie*, V, 106, 107. "When the wife has broken the marriage vow, the husband may put her away, returning her property; but when the man is guilty of this crime, or has even made himself suspected of it, his fate is worse; for then all the women of the neighborhood troop together and fall upon the offender with his possessions, who is lucky if he gets off with a whole skin. His landed property, his house, and everything he has are completely destroyed. If the husband does not bear himself humbly or friendly enough towards his wife, or if otherwise she is no longer pleased with him, she abandons him and goes to her parents, who then undertake the same work of destruction. Therefore many men are not willing to marry, and they live with paid women."

wife at the death of the husband; and the frequent restraint upon the remarriage of widows is ascribed to the same cause.[1]

As a final result of his minute examination, Westermarck concludes that there is "not a shred of genuine evidence for the notion that promiscuity ever formed a general stage in the social history of mankind." The hypothesis, he declares, is "essentially unscientific." How, then, it may be asked, can the series of phenomena adduced by McLennan and others to support that hypothesis be otherwise explained?

In the first place, it is believed, the direct evidence as to the existence of races living promiscuously in ancient and modern times will not stand the test of criticism.[2] Often the statements of writers and travelers prove on examination to be erroneous. Thus, for instance, Sir Edward Belcher's assertion, that among the Andaman Islanders "the custom is for the man and woman to remain together until the child is weaned, when they separate, and each seeks a new partner,"[3] has been "disproved by Mr. Man, who, after a very careful investigation of this people, says not only that they are strictly monogamous, but that divorce is unknown, and conjugal fidelity till death not the exception but the rule among them."[4] Sometimes the "facts adduced are not really instances of promiscuity." This appears to be true, as already seen, of the alleged Australian group-marriages. So also the "communism" practiced among the Cahyapós,

[1] For examples of all these customs read WESTERMARCK, *op. cit.*, 124 ff. On the sacrifice of widows in India and elsewhere, explained usually as an evidence of *patria potestas* under influence of ancestor-worship, consult ZIMMER, *Altindisches Leben*, 328 ff.; KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 376 ff.; LETOURNEAU, *L'évolution du mariage*, chap. XV; WAKE, *Marriage and Kinship*, 437 ff.; HELLWALD, *Die mensch. Familie*, 478–80 (India), 381 (China).

[2] For general criticism of the hypothesis of promiscuity compare with WESTERMARCK, *op. cit.*, chaps. iv–vi, 51–133; WAKE, *op. cit.*, 14–53; LETOURNEAU, *op. cit.*, 46 ff.; STARCKE, *op. cit.*, 121 ff., 241 ff., *passim*; SPENCER, *Principles of Sociology*, I, 661–71, 641 ff., *passim*; GROSSE, *Die Formen der Familie*, 41 ff.

[3] WESTERMARCK, *op. cit.*, 52, 53; BELCHER, "Notes on the Andaman Islands," *Trans. Eth. Soc.*, N. S., V, 45.

[4] *Journal Anth. Inst.*, XII, 135; WESTERMARCK, *op. cit.*, 57.

"who seem to be the most numerous tribe of the central plateaux of Brazil," turns out on examination to be something very different from promiscuity, resembling more the "temporary" marriages already mentioned, though combined with polygyny. "The communism of wives among them," says Magalhães,[1] "is as follows: The woman as soon as she reaches the age at which she is permitted to have relations with a man, conceives by the one who pleases her. During the period of gestation and nursing she is maintained by the father of the child, who may have others in similar charge and these others during similar periods live in the same cabin. As soon as the woman begins to work she is free to conceive by the same man or she may procure another, the charge of supporting the earlier offspring passing to the latter."[2] This institution, it is clear, involves considerable social regulation. Indeed we are particularly warned that "by communism of women is not to be understood anything like prostitution. . . . . This distinction is the more important for the proper comprehension of the savage family, since it is certain that in those same tribes where this communism exists, prostitutes are held in great displeasure." The custom "is a mode of family existence that they judge best according to their ideas and means of living." With it Magalhães contrasts the "exclusiveness" of the neighboring Guatos of the river Plate, in "Brazilian Paraguay," who are not monogamous, each man having "one, two, or three wives according to his ability in hunting, fishing, and the gathering of the different fruits which make up the base of their food." The women are exceedingly modest. "If a Guato woman brought us a fish, some game, wild fruit," or in any way sought "something of ours that she wanted, she did it always with her eyes

[1] MAGALHÃES, *op. cit.*, 108 ff.

[2] Compare the somewhat analogous "communism" of the Sia: STEVENSON, "The Sia," *XI. Rep. of Bureau of Eth.*, 19-26.

fixed on the ground or turned toward her husband." The related Chambioás of the Amazon valley are even more severe. Among them women are burned for adultery; and in their "widows' men" they have a curious device for the preservation of domestic peace.[1] All these tribes "guard with great caution against, and some even punish with death, the union of the two sexes before the complete puberty of the woman. . . . . Friar Francisco assured me that the virginity of the man was strictly maintained until the epoch of his marriage, and this was not allowed before he was twenty-five years of age, without even this being the ordinary thing: marriage is commonly after thirty." As a principal reason for this usage are assigned the "force and energy of the offspring."[2]

Savage tribes are often extremely licentious; but it is significant that the most immoral are not always lowest in the scale of development. Besides, it is well known that "contact with a higher culture, or more properly, the dregs of it, is pernicious to the morality of peoples living in a more or less primitive condition."[3] Nor can promiscuity as a general social stage be assumed from the existence of some tribes whose sexual relations are but slightly restrained, since, as just seen, there are others, not otherwise more advanced, remarkable for the chastity of the wedded as well as the unwedded life.[4]

The indirect evidence of a former stage of unrestricted

[1] There are in the villages "men destined to be *viri viduarum*. These individuals have no other duty; they are supported by the tribe and do not, like the others, engage in the exercises of long trips which they all make annually, each in his turn." This indulgence was justified on the ground that "the peace which the families enjoyed, and which they would not enjoy without these individuals, or rather without this institution, compensated largely for the work that fell upon the others in supporting them."—MAGALHÃES, *loc. cit.*

[2] MAGALHÃES, *loc. cit.*

[3] WESTERMARCK, *op. cit.*, 66 ff., where examples are given. See the quotation from Magalhães above.

[4] *Ibid.*, 61 ff.

sexual relations, based on the existence of certain customs assumed to be its survival, particularly female kinship, exogamy, and polyandry, turns out on examination to be even less convincing than that obtained from direct observation. Primitive man is usually influenced by extremely simple motives; and the great fault of speculation has been the assignment of remote and complex causes for phenomena which are often capable of easier explanation. "The most important features of the life of a community," Starcke observes, "are due to forces at once simple and universal."[1]

II. THE PROBLEM OF MOTHER-RIGHT

Such is the case with attempts to account for kinship in the female line. McLennan tkinks it "inconceivable" that it can be due to any cause other than uncertainty of fatherhood; and he holds therefore that it must have preceded the paternal system.[2] Careful research, however, has shown

[1] *Primitive Family*, 9; *ibid.*, 30. STARCKE is conspicuous for the simple causes which he assigns for the various phenomena connected with marriage and the family. See examples, *op. cit.*, 43, 49, 50, 106.

[2] *Studies*, I, 88, 83–146; *Patriarchal Theory*, chap. xiii. In general, on kinship in the female line, compare HELLWALD, *Die mensch. Familie*, 124, 150 ff., 239, 456–58; LIPPERT, *Die Geschichte der Familie*, 4 ff., 8 ff.; *Kulturgeschichte*, II, 90 ff., *passim;* DARGUN, *Mutterrecht und Raubehe*, 1 ff., 13, 17; *Mutterrecht und Vaterrecht*, 1 ff., 43 ff.; GIRAUD-TEULON, *Origines*, 131 ff.; POST, *Geschlechtsg.*, 88 ff., 94 ff.; *Familienrecht*, 7 ff.; *Ursprung*, 37 ff.; *Anfänge*, 10 ff.; *Afrikanische Jurisprudenz*, I, 13 ff.; KOHLER, *Zur Urgeschichte der Ehe*, 53 ff.; KOVALEVSKY, *Tableau*, 7 ff.; TYLOR, *On a Method*, 252 ff.; WILKEN, *Das Matriarchat*, 3 ff.; SMITH, *Kinship and Marriage*, 131 ff., 151 ff.; LUBBOCK, *Origin of Civilization*, 149 ff.; MORGAN, *Ancient Society*, 63 ff., 153–83, 344 ff. All the foregoing writers sustain in the main McLennan's and Bachofen's principal assumptions. On the other hand, they are rejected or criticised by SPENCER, *Principles of Sociology*, I, 665 ff.; WAKE, *Marriage and Kinship*, chaps. viii, ix, x; BERNHÖFT, in *ZVR.*, VIII, 4 ff.; MAINE, *Early Law and Custom*, chap. vii; FRIEDRICHS, in *ZVR.*, VIII, 370–83; X, 189 ff.; SCHURMAN, *Ethical Import of Darwinism*, 223; STARCKE, *Primitive Family*, 1–120; WESTERMARCK, *Human Marriage*, 96–113. HILDEBRAND, *Ueber das Problem*, 28–31, holds that the earlier mother-right gave place to the paternal system under influence of property. See also LETOURNEAU, *L'évolution*, 424, 377 ff., who believes that the maternal system is more archaic, but does not imply promiscuity; MUCKE, *Horde und Familie*, 114 ff., *passim;* and KAUTSKY, *Entstehung der Ehe*, 256 ff., 338 ff., who holds that the systems were independently developed; GROSSE, *Die Formen der Familie*, 48 ff., 61, who believes it possible that the two systems may have been worked out side by side and that they are not necessarily successive phases of development.

that these assumptions are far from axiomatic. In the first place, the acute criticism of Friedrichs is deserving of special attention. Among a number of low races where relationship with the begetter is not recognized he finds that certainty of fatherhood through securing the fidelity of the wife nevertheless exists. The number is small, but a single certain example, he insists, is sufficient to refute McLennan's hypothesis. Such an example is provided by Semper[1] in the case of the people of the Palau Islands; and it is all the more convincing because here it is only the wife who is prohibited from general sexual intercourse, while young girls may give free play to their desires, and in a measure this is not merely suffered, but even enjoined by social custom.[2] Indeed, savages know well how to secure chastity on the part of their women by such "naïve arts" as infibulation, so realistically described by Ploss in his well-known book on woman.[3]

While not denying that uncertainty of fatherhood may have been influential in some cases, Spencer argues that without this assumption it is perfectly natural that the child should be named from the mother with whom it spends its early life; and where exogamy prevails the custom would become a convenient rule for determining who are marriageable women within the group; for the "requirement that a wife shall be taken from a foreign tribe readily becomes confounded with the requirement that a wife shall be of foreign blood."[4]

Westermarck seeks a simple explanation of female kinship in the necessary relations of a child with its mother. "Especially among savages, the tie between a mother and a

[1] *Palauinseln* (1873), 320, 119, 181; KOHLER, in *ZVR.*, VI, 327.

[2] FRIEDRICHS, "Ueber den Ursprung des Matriarchats," *ZVR.*, VIII, 374, 375.

[3] *Das Weib*, I, 172 ff., 179 ff. See also his *Das Kind*, I, 383 ff.; and compare FRIEDRICHS, *op. cit.*, 375, 376; HELLWALD, *op. cit.*, 343.

[4] *Principles of Sociology*, I, 665, 666.

child is much stronger than that which binds a child to the father. Not only has she given birth to it, but she has also for years been seen carrying it about at her breast. Moreover, in cases of separation, occurring frequently at lower stages of civilization, the infant children always follow the mother, and so, very often, do the children more advanced in years."[1] Polygyny has doubtless favored the choice of the female line of descent;[2] and the odd custom of the couvade, found here and there among rude peoples, instead of being a mark of transition to the paternal system, only implies some connection or "some idea of relationship" between father and child;[3] and accordingly simpler and more probable reasons for its origin have been assigned.[4]

[1] WESTERMARCK, *op. cit.*, 107-13; *cf.* LUBBOCK, *Origin of Civilization*, 149 ff.

[2] WESTERMARCK, *op. cit.*, 108; STARCKE, *op. cit.*, 27, 28, 35, 36, 40, 41, 69 n. 4, citing WINTERBOTTOM, *An Account of the Native Africans in the Neighborhood of Sierra Leone*. *Cf.*, however, DARGUN, *Mutterrecht und Vaterrecht*, 59 ff.

[3] WESTERMARCK, *op. cit.*, 106, 107, 17.

[4] In the couvade the father occupies the erroneously so-called lying-in bed; is nursed and otherwise cared for as if he were the mother: while he rigidly fasts or abstains from certain kinds of food. GIRAUD-TEULON, *Origines du mariage*, 138; BACHOFEN, *Mutterrecht*, 17, 255, 419; LETOURNEAU, *L'évolution du mariage*, 394-98; BERNHÖFT, in *ZVR.*, IX, 417; and LUBBOCK, *Origin of Civilization*, 14 ff., 159, regard the couvade as a mark of transition. Such, in effect, is also the view of LIPPERT, *Kulturgeschichte*, II, 312; *Geschichte der Familie*, 213 ff., who believes the custom is a form of redemption-sacrifice rendered by the father instead of the actual sacrifice of the first-born child, a sacrifice exacted in the stage of earlier mother-right. HELLWALD, *Die mensch. Familie*, 361 ff., accepts the theory of Lippert. On the other hand, TYLOR, *Early History of Mankind*, chap. X, 297 ff.; STARCKE, *Primitive Family*, 51, 52, 283, 284; and DARGUN, *Mutterrecht und Vaterrecht*, 18-26, hold that it takes its rise in a supposed physical connection betweeen father and child, and therefore that it exists for the welfare of the child alone. LUBBOCK, *op. cit.*, 14 ff., emphasizes this fact, while regarding the practice as an evidence of transition. TYLOR, however, in his *Method of Investigating Institutions*, 254-56, accepts the view of Bachofen and Giraud-Teulon, relegating the explanation first assigned by him to a secondary place. ROTH, "On the Significance of the Couvade," *Jour. Anth. Inst.*, XXII, 204-44, holds the custom to be a form of magic or witchcraft, resting on the belief in a physical connection between the father and child, and so implying power over the child. According to CRAWLEY, *Mystic Rose*, 416-28, the custom has its origin in sexual taboo. It is a case of "substitution." The father simulates the mother so that by exposing himself to the same danger he may help her and the child against the magical or evil influences which are especially harmful in the great sexual crises of human life. *Cf.* KOHLER, "Das Recht der Azteken," *ZVR.*, XI, 49; MÜLLER, *Chips from a German Workshop*, II, 281, 278; PLOSS, *Das Kind*, I, 143-53; MUCKE, *Horde und Familie*, 219 ff.; FRIEDRICHS, in *Ausland* (1890), 801, 837, 856, 877, 895; CHAMBERLAIN, *The Child and Childhood in Folk-Thought*, 124, 125.

Thus it may take its rise in the notion of a mysterious physical connection between the father and the child. "The well-being of the child is its object." The father occupies the so-called lying-in bed, not as a bed of sickness "affording rest and strength after travail," but he abstains from certain foods lest they should injure the child, and he fasts in order that his powers of endurance may be assured to it.[1] This view is strongly supported by the fact that among many primitive peoples, in various stages of advancement, the belief is found that the child springs from the father alone, the mother merely performing the function of nourishment.[2] Finally Westermarck's generalization as to the real import of kinship through females only may be noted. The "facts adduced as examples" of this system, he declares, "imply chiefly that children are named after their mothers, not after their fathers, and that property and rank succeed exclusively in the female line."[3]

Starcke has devoted the first half of his book to a detailed investigation of the problem of female descent, and comes to the conclusion that it depends mainly on local and economic causes. He first shows that the clan is of later origin than the family; and holds that these are by nature very different institutions. The family is juridical, established by contract, and only "in a subsidiary sense" founded on the "tie of blood between parents and children;" but the clan is a natural and homogeneous group of kindred among whom degrees of relationship are not counted. It is an exclusive group into which the child is born; and "it is absolutely impossible for one person to belong to two dis-

[1] STARCKE, *op. cit.*, 52. See the preceding note; also LIPPERT, *Geschichte der Familie*, 213 ff., who criticises the use of the term "lying-in bed."

[2] FUSTEL DE COULANGES, *Ancient City*, 47, 70, *passim;* see further, WESTERMARCK, *op. cit.*, 107, 108; HOWITT, *Smithsonian Report* (1883), 813; MAINE, *Early Law and Custom*, 203; WILKINSON, *Ancient Egyptians*, I, 320.

[3] *Human Marriage*, 97. He insists on the powerful influence of names on the rules of succession: *ibid.*, 111.

tinct clans."[1] In the primitive stage, before the formation of clans, the family must always be a more or less isolated group. The man usually chooses the place of abode, and hence paternal kinship may be easily recognized. A considerable number of rude peoples exist who take kinship from the father;[2] and Starcke is inclined to believe, though he presents rather slender evidence, that as a general rule the paternal precedes the maternal system. With the rise of the clan organization, it became absolutely necessary for the local groups to take one system or the other. So the "definition of kinship results from the conflict between clans, and teaches us nothing further with respect to the child's relation to its parent. The choice between the two possible lines is decided by the economic organization of the community and by the local grouping of individuals, but there is not the slightest trace of the fact that considerations with respect to the sexual relations had any influence in the matter."[3]

Starcke's opinion that such rules of succession depend on local connections, those persons being each other's heirs "who dwell together in one place,"[4] seems to gain some support from the result of Dr. Tylor's examination of the so-called "beena"[5] marriage form, which requires the man to live in the family of his wife, usually serving for her as

[1] STARCKE, *op. cit.*, 10–16, 25.

[2] *Ibid.*, 26, 27, 30, 58 ff., 101; WESTERMARCK, *op. cit.*, 98 ff.

[3] STARCKE, *op. cit.*, 118; *cf. ibid.*, 54. FRIEDRICHS agrees with Starcke on the essential point. The uterine system arises with the formation of families and *gentes*. In a very primitive state, the natural means of subsistence sufficing, the children leave the parents and look out for themselves; as it becomes more and more difficult to find food and shelter, family groups are formed, and the children remain a longer time with the mother. Hence naturally the name and kinship are taken from her: "Ueber den Ursprung des Matriarchats," *ZVR.*, VIII, 378 ff. Compare *idem*, "Familienstufen und Eheformen," *ibid.*, X, 197 ff., 201. DARGUN, *Mutterrecht und Vaterrecht*, 43–66, discusses the original mother-right, but rejects Starcke's theory of local causes, accepting uncertainty of fatherhood as a primary influence. Starcke is also criticised by HELLWALD, *Die mensch. Familie*, 456–58, 465, 484 ff.

[4] *Op. cit.*, 36, *passim*; summarized by WESTERMARCK, *op. cit.*, 110.

[5] See above, p. 16, on "beena" marriage.

did Jacob for Laban's daughters. It is remarkable that this custom and the maternal system of kinship are commonly found together. "Thus the number of coincidences between peoples where the husband lives with the wife's family and where the maternal system prevails, is naturally large in proportion, while the full maternal system as naturally never appears among peoples whose exclusive custom is for the husband to take his wife to his own home." [1] Furthermore, adds Westermarck, "where both customs—the woman receiving her husband in her own hut, and the man taking his wife to his—occur side by side among the same people, descent in the former cases is traced through the mother, in the latter through the father." [2]

It seems certain that the whole truth regarding the problems of kinship, as well as regarding the rise and sequence of the forms of the family, can be reached only through a thorough historical investigation of the industrial habits of mankind. In fact, the position of Starcke, that the rise of rules of descent and kinship depends mainly on economic and local causes, is strengthened in a remarkable way by the researches of Grosse, which have already been presented in outline. Nowhere does promiscuity appear among the peoples known to history or ethnology; and everywhere, even among the "lower hunters," comprising the most backward members of the human kind, appears

[1] TYLOR, *On a Method of Investigating the Development of Institutions*, 258. *Cf.* WESTERMARCK, *op. cit.*, 109; also STARCKE, *op. cit.*, 79, 80, who regards serving as a form of wife-purchase, and the migration of the husband as "due to the great cohesive power of the several families, which causes them to refuse to part with any of their members." Among various American peoples it is the custom for the husband to take up his abode permanently in the wife's family: SOUZA, "Tratado descriptivo do Brazil," *Revista Inst. Hist.*, XIV, 311 ff.; STEVENSON, "The Sia," *XI. Rep. of Bureau of Eth.*, 20, 22; or temporarily: DOBRIZHOFFER, *Account of Abipones*, II, 208, 209; POWELL, "Wyandotte Society," in *A. A. A. S.*, XXIX, 681; MACCAULEY, "Seminole Indians," *V. Rep. of Bureau of Eth.*, 496; MCGEE, "The Seri Indians," *XVII. Rep. of Bureau of Eth.*, 280.

[2] WESTERMARCK, *op. cit.*, 110. Compare SMITH, *Kinship and Marriage*, 74 ff.; MCLENNAN, *Studies*, I, 101 ff.; and MARSDEN, *History of Sumatra*, 225.

the single family in which the man holds the place of power, which is often despotic. There is no definite sequence between the maternal and the paternal systems. The existence of either depends upon favorable economic conditions; and they may both appear side by side. In fact, according to Cunow, among the lower hunters, with the single exception of the Australians, the custom of female descent has not yet been discovered; and even in Australia it is precisely the most advanced tribes among which the maternal system appears. It first arises when women are sought outside of the original horde, in order to prevent intermarriage of maternal kindred.[1]

In the light of present research, therefore, the most that can safely be admitted concerning the system of kinship through females only is that it has widely existed among the races of mankind;[2] although, as elsewhere shown, its prevalence has been greatly exaggerated. Partially under the influence of monogamy and the rise of modern forms of property, it has often been superseded by the parental and sometimes by the agnatic system, although this sequence is by no means invariable. It is very archaic, yet not necessarily primitive. There is no satisfactory evidence that it implies an original stage of promiscuity. It is not impossible, in view of the facts disclosed by Starcke, that sometimes it may be preceded by a custom in which the child is named from the father, and rank and property descend in the

[1] See CUNOW, "Die ökonomischen Grundlagen der Mutterherrschaft," *Neue Zeit* (1897–98), XVI, 115, 113, 14, reviewing and supplementing GROSSE'S *Die Formen der Familie*, summarized above. The investigations of Hildebrand, elsewhere mentioned, tend in the same direction.

[2] LETOURNEAU, *L'évolution du mariage*, 424, thus concludes his investigation of the question of kinship : "Ce qui est vraisemblable, c'est que, dans la majorité des cas, la filiation paternelle a succédé à la filiation maternelle et à des formes familiales plus ou moins confuses." *Cf. ibid.*, 399, 400. MAX MÜLLER, *Biographies of Words*, p. xvii, thinks that "we can neither assert nor deny that in unknown times the Aryans ever passed through a metrocratic stage." *Cf.* WESTERMARCK, *op. cit.*, 104, 113.

male line; while there is evidence that in the lower hunting stage, before rules of descent were yet subjects of reflection, a kind of patriarchate or androcracy generally prevailed.[1]

III. THE PROBLEM OF EXOGAMY

The case is much the same with the problem of exogamy, which is closely connected with the question of kinship. According to McLennan, as already seen, exogamy, or the prohibition of marriage within the clan, owes its rise to wife-capture occasioned by scarcity of women through female infanticide; and it is contrasted with the opposite custom of endogamy, which, it is alleged, usually implies a higher stage of civilization. This account of its origin, he thinks, is, on the whole, the "only one which will bear examination."

How far it really falls short of the truth was first pointed out by Herbert Spencer. "In all times and places, among savage and civilized," he says, "victory is followed by pillage. Whatever portable things of worth the conquerors find, they take. . . . . The taking of women is manifestly but a part of this process of spoiling the vanquished. Women are prized as wives, as concubines, as drudges; and, the men having been killed, the women are carried off along with the other moveables." Thus "women-stealing" is an "incident of successful war." But a woman so taken has a double value. "Beyond her intrinsic value she has an extrinsic value. Like a native wife, she serves as a slave:

[1] "Among the lower hunters there is no matriarchate, but—if indeed one may make the distinction—only a patriarchate or rather an androcracy (*Mannesherrschaft*). Even in those Australian tribes where the custom of maternal succession exists, the woman follows the man into his horde and becomes his property. Their children remain in his horde, and not she but he has the disposition of the offspring. . . . . This primitive patriarchate, of course, has nothing to do with that of the later patriarchal family. It is not based on any reflection regarding descent or the man's share in procreation; it rests simply on the right of the stronger, on the rude physical superiority of man, his position as winner of the greater share of the food and as protector" of the family community.—CUNOW, *op. cit.*, 115, 116.

but unlike a native wife, she serves also as a trophy." A warrior possessing such a token of prowess gains social distinction. "In a tribe not habitually at war, or not habitually successful in war, no decided effect is likely to be produced on the marriage customs." But in warlike and successful tribes an "increasing ambition to get foreign wives" will arise. Among savages, proofs of courage are often required as qualifications for marriage. Hence it is not surprising that the abduction of a foreign woman should be accepted as the best proof of all. "What more natural than that where many warriors of the tribe are distinguished by stolen wives, the stealing of a wife should become the required proof of fitness to have one? Hence would follow a peremptory law of exogamy." Spencer's interpretation, therefore, agrees with that of McLennan in finding the origin of exogamy in wife-capture and in implying that usage grows into law. But it does not, "like his, assume either that this usage originated in a primordial instinct, or that it resulted from a scarcity of women caused by infanticide.[1] Moreover, unlike Mr. McLennan's, the explanation so reached is consistent with the fact that exogamy and endogamy in many cases co-exist; and with the fact that exogamy often co-exists with polygyny;" nor does it "involve us in the difficulty raised by supposing a peremptory law of exogamy to be obeyed throughout a cluster of tribes." For if exogamy would be likely to arise in tribes usually successful in war, peaceful tribes and those usually worsted in war, though living side by side with the successful and warlike, would be naturally led to adopt the rule of endogamy. Furthermore, among tribes not differing much from one another in strength, endogamy and exogamy may coexist. "Stealing of wives will not be reprobated, because the tribes robbed

[1] SPENCER, *Principles of Sociology*, I, 649–52. It should be noted that McLennan really ascribes the origin of exogamy to wife-capture, though, inadvertently seemingly, in one passage he refers it to a "primitive instinct."

are not too strong to be defied; and it will not be insisted on, because the men who have stolen wives will not be numerous enough to determine the average opinion." Spencer also maintains that the symbol of rape in the marriage ceremony does not necessarily imply the previous existence either of foreign wife-stealing or of exogamy, assigning three other reasons which singly or together may account for it. First, it may result from a struggle for women within the tribe. "There still exist rude tribes in which men fight for possession of women, the taking possession of a woman naturally comes as a sequence to an act of capture. That monopoly which constitutes her a wife in the only sense known by the primitive man is a result of successful violence."[1] Secondly, contrary to the view of Sir John Lubbock,[2] the symbol of rape may be due to the struggle of the bride and her female friends, many manifestations of which are found in the marriage customs of primitive races; though the dread of harsh treatment is thought to be an additional motive. But Starcke, doubting whether among savages there is much to choose between the brutality of the husband and that of the father, thinks the weeping of the woman merely symbolizes her sorrow "on leaving her former home; her close dependence on her family is expressed by her lamentation." The existence of such symbols is not surprising in "communities of which the family bond is the alpha and omega."[3] The ceremony of capture, finally, may be due to the resistance of the father and other male friends of the bride. A woman has an economic value, "not only as a wife but also as a daughter; and all through, from the lowest to the highest stages of social progress, we find a tacit or avowed claim to her services

[1] See STARCKE, *op. cit.*, 217, who thinks Spencer inconsistent with his own theory; for "if the rape of women can be practised within the tribe, it need no longer be assumed that a young man's ambition impels him to take a wife from another tribe."

[2] *Origin of Civilization*, 111, 130.

[3] STARCKE, *op. cit.*, 217, 218.

by her father." Her service is an object of purchase; and in English law "we have evidence that it was originally so among ourselves: in an action for seduction the deprivation of a daughter's services is the injury alleged."[1]

Sir John Lubbock is likewise an adherent of the view that exogamy originates in wife-capture; but he connects his explanation with his peculiar theory of the communistic family, and it cannot therefore be accepted, if that theory is to be rejected.[2] He holds that originally all the men and women of a tribe lived in sexual communism and individual marriage was looked upon "as an infringement of communal right." But "if a man captured a woman belonging to another tribe he thereby acquired an individual and peculiar right to her, and she became his exclusively." In this way, the practice of capturing foreign wives led to individual marriage, and its evident advantages eventually produced the rule of exogamy. Accordingly, the "symbol of rape became such an important part of the wedding ceremonies, because it was the symbol of giving up the woman to become the exclusive possession of one man."[3] McLennan, however, criticises this view on the ground that "in almost all cases the form of capture is the symbol of a group act — of a siege, or a pitched battle, or an invasion of a house by an armed band." Seldom does it represent a capture by an individual. "On the one side are the kindred of the husband; on the other the kindred of the wife." Furthermore, if women were commonly captured by the men of a group or parties of them, as he justly observes, it is hard to see how an individual who had captured a woman could appropriate her more easily than he could appropriate any woman of

[1] SPENCER, *op. cit.*, I, 652–60. Spencer is criticised by WESTERMARCK, *op. cit.*, 311 ff.; STARCKE, *op. cit.*, 215 ff.

[2] LUBBOCK, *op. cit.*, 86, 98, 103, 104–43. *Cf.* the criticism of STARCKE, *op. cit.*, 220, 221; WESTERMARCK, *op. cit.*, 316; MCLENNAN, *Studies*, I, 329–47.

[3] STARCKE, *op. cit.*, 220; LUBBOCK, *op. cit.*, 109 ff.

his own group for whom he had a fancy.[1] Very different is the explanation offered by Tylor, who regards exogamy as the primitive mode of alliance and "political self-preservation." "Among tribes of low culture there is but one means known of keeping up permanent alliance, and that means is intermarriage." Often the alternative has been "marrying out" or "being killed out." Endogamy, on the other hand, "is a policy of isolation, cutting off a horde or village, even from the parent stock whence it separated."[2] That exogamy has often, perhaps generally, served the political purpose suggested by Tylor is not improbable, and his view is sustained by that of Post and Kohler;[3] but this will not account for its origin.

Both Lubbock and Spencer, it will be observed, agree with McLennan in assigning the origin of exogamy to wife-capture. On the other hand, a group of writers, differing widely on ancillary questions, unite in identifying the causes which have produced exogamy with those which, in general, have led to the establishment of forbidden degrees of consanguinity in marriage. In other words, tribal or clan exogamy is but one of many rules for the prevention of close intermarriage between kindred. It must be admitted that a profound horror of incest is now "an almost universal characteristic of mankind, the cases which seem to indicate a perfect absence of this feeling being so exceedingly rare that they must be regarded merely as anomalous aberrations from a general rule."[4] But, from the beginning, has there been an innate aversion to the sexual union of persons closely related by blood? Is that aversion derived from experience

[1] McLENNAN, *op. cit.*, I, 344, 345, 329 ff.

[2] *On a Method of Investigating the Development of Institutions*, 267, 268; *cf.* WESTERMARCK, *op. cit.*, 316, 317.

[3] KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 360-62; POST, *Familienrecht*, 79, 83. TYLOR, *op. cit.*, 365, 366, denies that capture and exogamy are related as cause and effect.

[4] WESTERMARCK, *op. cit.*, 290.

of the injurious results of such unions? Did it originally extend only to marriage and not to irregular sexual connections? Or, finally, is it the indirect result of a custom, such as wife-capture, hardening into a rule of forbidden degrees? These are questions to which very different answers have been given.

Adherents of the horde theory, of course, deny that horror of incest is a primitive instinct. Such is the view also of Spencer, who thinks that "regular relations of the sexes are results of evolution, and that the sentiments upholding them have been gradually established,"[1] though—somewhat inconsistently, as we have seen—he agrees with McLennan in regarding exogamy as the result of custom growing into law. Lubbock takes a similar position, denying that we can "attribute to savages any such farsighted ideas" as the recognition of the injurious effects of close intermarriage.[2] On the other hand, Morgan, whose consanguine family implies the absence of any primitive abhorrence of incest, considers exogamy "explainable, and only explainable as a reformatory movement to break up the intermarriage of blood relations," thus implying that the aversion to such a union is derived from experience.[3] But knowledge which "can only be gained by lengthened observation," Dr. Peschel believes, "is 'unattainable by unsettled and childishly heedless races,' among whom, nevertheless, a horror of incest is developed most strongly."[4] Sir Henry Maine, on the contrary, "cannot see why the men who discovered the use of fire and selected the wild forms of certain animals for domestication and of vegetables for cultivation should not

[1] SPENCER, *op. cit.*, I, 636 ff. [2] LUBBOCK, *op. cit.*, 133.

[3] MORGAN, *Proceedings of the American Academy of Arts and Sciences*, VII, 469; *Ancient Society*, 69, 424 ff.; *cf.* STARCKE, *op. cit.*, 323; WESTERMARCK, *op. cit.*, 317.

[4] PESCHEL, *Races of Man*, 224; WESTERMARCK, *op. cit.*, 317, 318; also DARWIN, *Animals and Plants under Domestication*, II, 124; LUBBOCK, "Customs of Marriage and Systems of Relationship among the Australians," *Jour. Anth. Inst.*, XIV, 309.

find out that children of unsound constitution were born of nearly related parents."[1] The researches of Starcke, and still more those of Westermarck, render it almost certain, however, that Morgan and Maine are mistaken in their view, though it may point the way to the truth.[2]

Starcke's argument leads up to the conclusion that the basis of exogamy is to be sought in the causes which produced the clan; for between the clans of a tribe exogamy almost always prevails, and, without exception, clanless tribes are "endogamous or at least not exogamous." Furthermore, tribes divided into clans are usually endogamous as to the tribe.[3] Now, prohibitions are found which cannot be due to "exogamy as a definition of the clan;" such is the prohibition of marriage between mother and son where agnation is in force, and "between father and daughter where the uterine line prevails." Since, therefore, "exogamy as a definition of the clan cannot directly produce these prohibitions, which are found wherever exogamy occurs, and in some instances where it is absent," the inference follows that exogamy must have its origin in the abhorrence of close intermarriage and the ideas to which that is due. But these ideas are not necessarily the same as those underlying "the various prohibited degrees of marriage which are now in force;" nor do they imply that the injuriousness of such unions is the ground of the aversion. "In a community in which marriage takes place between consumptive and syphilitic persons, and those affected by hereditary disease, without being condemned by public opinion, and still less by the law, it cannot be said that the condemnation of incest is

[1] MAINE, *Early Law and Custom*, 228.

[2] DARWIN, *op. cit.*, II, 103, 104, accepts HUTH's view (*Marriage of Near Kin*), that there is no "instinctive feeling in man against incest any more than in gregarious animals."

[3] This is the view of MORGAN, *Ancient Society*, 512–14; also of MAINE, *op. cit.*, 221 ff.; FISON AND HOWITT, *Kamilaroi and Kurnai*, 117, 138 ff.; WESTERMARCK, *op. cit.*, 363.

founded on our regard for posterity."[1] In harmony with his view that marriage is juridical, not founded on sexual relations, he finds the origin of the horror of marriage between near kindred in the legal incongruity of such unions and in their danger to the peculiar constitution of the ancient family itself. Marriage between a brother and sister or between a mother and son would usually be impossible because the "son possesses nothing which he could offer to the father as purchase-money." To accomplish the purpose by force would be an "unheard-of crime among savages." A connection between a father and daughter would seldom occur, "since a father is unwilling to renounce the advantages of bestowing his daughter in marriage."[2] "If in this way an impression arises that there is something unusual and incompatible with other ideas in marriage between such persons, an occasional calamity which befalls any of them will be enough to excite the imaginative faculty in the highest degree; and if no prohibition previously existed, the absolute condemnation of such marriages would then be pronounced." In a word, "the intermarriage of individuals of the same family implies that persons who have no legal right to dispose of themselves and their property nevertheless agree upon such legal disposition, an encroachment which would certainly be violently opposed by primitive men." In the same way, exogamy will arise between clans; and the co-existence of endogamy and exogamy seems to be consistently explained by this theory. "Exogamy prohibits marriage between persons who are so nearly related that they have no legal independence of each other; endogamy

[1] STARCKE, *op. cit.*, 212, 223, 224.

[2] In this part of his argument Starcke's generalizations are scarcely sustained by the evidence. See the criticism of CUNOW, *Australneger*, 180-84, who urges the well-known fact that many of the lowest peoples are not acquainted with wife-purchase at all; and even where wife-purchase exists, it might seem to be of as much advantage to a father to marry his daughter to her brother as, for instance, to allow the son to obtain a wife by offering his sister in exchange.

prohibits the marriage of persons whose legal status is too remote from each other."[1] In corroboration of his view, Starcke finds evidence that, here and there, a distinction is made between regular marriage and sexual intercourse, the former being forbidden, unless for special reasons, while the latter is allowed.[2]

If Starcke's explanation of the origin of the dread of close intermarriage between kindred is too vague and ill supported by definite proof, his original suggestion that exogamy must take its rise in that horror is sustained and placed on a broader foundation by the singularly interesting researches of Westermarck[3]—a scholar who has rendered to social science a very important service by carrying the principles of organic evolution into the sphere of domestic institutions. He starts with the assertion that horror of incest is universal. Writers have, indeed, collected evidence which they believe points to a time when such an aversion did not exist. Thus marriage with a sister is permitted in Ceylon and Annam; in the royal families of Siam, Burma, and the Sandwich Islands; while the same custom prevailed, as is well known, among the Ptolemies of Egypt, and among the kings of ancient Persia.[4] But these unions are either "anomalous aberrations" from the general rule; or else they are allowed in order to preserve the purity of caste or the royal blood; or, in case of half-sisters, because relationship is traced in one line only;[5] while occasionally they may result from

[1] STARCKE, *op. cit.*, 233, 229, 230.

[2] *Ibid.*, 227, 228.

[3] WESTERMARCK, *op. cit.*, chaps. xiv, xv, xvi, 290-382. These chapters should be read in the light of the results obtained in those on "Law of Similarity," the "Means of Attraction," "Sexual Selection," and the "Liberty of Choice."

[4] For the evidence of incestuous marriages, see WESTERMARCK, *op. cit.*, 292 ff., 331 ff.; STARCKE, *op. cit.*, 44, 209 ff.; SPENCER, *Principles of Sociology*, I, 636; GIRAUD-TEULON, *Origines*, 60 ff.

[5] This may perhaps explain why half-sisters and half-brothers may marry among the Todas where relationship is in the male line: MARSHALL, *A Phrenologist amongst the Todas*, 206, 221.

"extreme isolation" or from "vitiated instincts."[1] Everywhere prohibitions exist, though they vary greatly in the "degrees of kinship within which union is forbidden." As a rule, "among peoples unaffected by modern civilization the prohibited degrees are more numerous than in advanced communities, the prohibitions in a great many cases referring even to all the members of the tribe or clan."

For instance, to select a few examples from the wealth of illustration provided by Westermarck, the "Californian Gualala account it 'poison,' as they say, for a person to marry a cousin or an avuncular relation, and strictly observe in marriage the Mosaic table of prohibited affinities."[2] Among the "Bogos of Eastern Africa, persons related within the seventh degree may not intermarry, whether the relationship be on the paternal or maternal side;" and a similar rule exists among the Pipiles of San Salvador. "Among the Kalmucks, no man can marry a relation on the father's side; and so deeply rooted is this custom among them, that a Kalmuck proverb says, 'The great folk and dogs know no relationship,' alluding to the fact that only a prince may marry a relative." Often clan exogamy is enforced by the severest penalties. "The Algonquins tell of cases where men, for breaking this rule, have been put to death by their nearest kinsfolk."[3]

[1] Here and there among low races one finds examples of alleged incest recorded. Thus among the New England Indians marriages between brothers and sisters are said to have existed: WAITZ, *Anthropologie*, III, 106. "Among these people only," says Turner of the Innuit on the Labrador coast, "have I heard of a son who took his mother as a wife, and when the sentiment of the community compelled him to discard her he took two other women, who were so persecuted by the mother that they believed themselves to be wholly under her influence." "Ethnology of the Ungava District," *XI. Rep. of Bureau of Eth.*, 180. So also D'EVREUX suspects incest, not marriage, between brothers and sisters among the Brazilian Indians: *Voyage dans le Nord du Brésil, 1613-14*, 85-95. On the other hand, DOBRIZHOFFER says the Abipones abhor marriage with near kindred: *Relation*, II, 212; and the same appears to be true of the Kafirs: RATZEL, *History of Mankind*, II, 435. See also the examples mentioned by GROSSE, *Die Formen der Familie*, 129, 130.

[2] WESTERMARCK, *op. cit.*, 297; POWERS, *Tribes of California*, 192.

[3] WESTERMARCK, *op. cit.*, 297, 305, 306.

Westermarck next takes up the origin of prohibited degrees; and after a critical examination of the various theories to explain it, he comes to the conclusion that in no case observed is the prohibition of incest founded on conscious experience of its injurious effects. It has not come into existence as the result of observation or calculation or through education on the part of the savage. Law and custom might thus arise; and these may "prevent passion from passing into action, they cannot wholly destroy its inward power." The home is kept pure "neither by laws, nor by customs, nor by education, but by an *instinct* which under normal circumstances makes sexual love between the nearest kin a psychical impossibility." But this instinct is not an "*innate* aversion to marriage with *near relations*." It is rather an "innate aversion to sexual intercouse between persons living very closely together from early youth;" and "as such persons are in most cases related, this feeling displays itself chiefly as a horror of intercourse between near kin." It is not "by the degrees of consanguinity, but by the close living together that prohibitory laws against intermarriage are determined."[1]

This theory, it will be noticed, coincides with that of Starcke in selecting local contiguity or the intimate association of family life as the fundamental fact. It differs, however, in several important particulars. The economic or legal motives are not emphasized; and Westermarck's explanation is broader than Starcke's, for he holds that the aversion extends to sexual connections outside of regular marriage.

It is impossible here to do more than indicate the character of the evidence by which Westermarck powerfully supports his conclusion. Among the Greenlanders, for instance, "it would be reckoned uncouth and blamable, if a lad and a

[1] *Ibid.*, 318, 320, 321. WAKE, *Marriage and Kinship*, 55, 56, expresses a similar view.

girl, who had served and been educated in one family, desired to be married to one another." It is even "preferred that the contracting parties should belong to different settlements."[1] Among the Kandhs, according to Colonel Macpherson, "marriage cannot take place even with strangers who have been long adopted into, or domesticated with, a tribe;" and the Cis-Natalian Kafirs are reputed to "dislike marriage between persons who live very closely together, whether related or not."[2] Further proof is derived from the fact that "many peoples have a rule of exogamy, which does not depend on kinship at all." Piedrahita, in the seventeenth century, "relates of the Panches of Bogota that the men and women of one town did not intermarry, as they held themselves to be brothers and sisters, and the impediment of kinship was sacred to them; but such was their ignorance that, if a sister were born in a different town from her brother, he was not prevented from marrying her."[3] So also the "Yaméos, on the river Amazon, will not suffer an intermarriage between members of the same community 'as being friends in blood, though no real affinity between them can be proved;'" and the Uaupés, of the same region, "do not often marry with relations, or even neighbours, preferring those from a distance, or even from other tribes."[4]

The great variation in the extent of prohibited degrees found among nations is "nearly connected with their close living together." Savage and barbarous peoples, "if they have not remained in the most primitive social condition of man, live, not in separate families, but in large households or communities, all the members of which dwell in very close

[1] WESTERMARCK, *op. cit.*, 321, citing EGEDE, *Description of Greenland*, 141; NANSEN, *The First Crossing of Greenland*, II, 330.

[2] WESTERMARCK, *op. cit.*, 321, citing MACPHERSON, *Memorials of Service in India*, 69.

[3] TYLOR, *On a Method of Investigating the Development of Institutions*, 268; PIEDRAHITA, *Historia general* (1688), 11; WESTERMARCK, *op. cit.*, 321.

[4] *Ibid*, 322; WALLACE, *Travels on the Amazon*, 497.

contact with each other." Such are the house-communities of the American aborigines, found everywhere, from the "long houses" of the Iroquois to the vast pueblos or "cities" of Mexico and Yucatan;[1] the "joint undivided families" of the Hindus and Southern Slavs;[2] and the *trevs* or clan households of ancient Wales, comprising four generations living in one inclosure, whose members are forbidden to intermarry.[3] It is significant that in all such cases we find extended prohibitions of close intermarriage, which do not exist "where the family lives more separately." In fact, there is a marked tendency, amounting almost to a law, that the larger the family or clan group, the wider is the circle of forbidden degrees; and, on the contrary, the more isolated and dispersed the manner of life, the greater is the liberty of matrimonial choice.[4]

In the same way prohibition of marriage on the ground of "affinity" or "spiritual relationship" may take place. "By association of ideas" the "feeling that two persons are intimately connected in some way" may "give rise to the notion that marriage or intercourse between them is incestuous." A strong argument is also derived from the "classificatory system of consanguinity." Tylor has shown that this system and the system of exogamy are, in most cases, found together. They are the "two sides of one institution."[5]

But a deeper and still more interesting question remains: "How has this instinctive aversion to marriage between per-

[1] MORGAN, *Houses and House-Life of the American Aborigines;* FISKE, *Discovery of America*, I, 64 ff.; WESTERMARCK, *op. cit.*, 324.

[2] MAINE, *Early History of Institutions*, 7, 78, 106, 195, 200, *passim; Early Law and Custom*, chap. viii; KRAUSS, *Sitte und Brauch der Südslaven*, 14, 64, 72, 79 ff., 84, etc.; KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 362; *cf.* LYALL, *Asiatic Studies*, chap. vii.

[3] LEWIS, *Ancient Laws of Wales*, 56, 57, 196.

[4] WESTERMARCK, *op. cit.*, 323-28.

[5] TYLOR, *On a Method of Investigating the Development of Institutions*, 261 ff.; *cf.* WESTERMARCK, *op. cit.*, 328, 329.

sons living closely together originated?" We cannot help feeling that through his masterly solution of this difficult problem Westermarck has at last brought us very near to the truth. He finds the key to it in the biological law of similarity.[1] It is demonstrated that a "certain degree of similarity as regards the reproductive system of two individuals is required to make their union fertile and the progeny resulting from this union fully capable of propagation." But the similarity must not be *too* close. A certain amount of differentiation is requisite; but the differentiation must not be too great.[2] There must be homogeneity combined with heterogeneity. Among domestic animals close interbreeding, it is well known, leads to infertility and degeneration; and Darwin's researches prove that self-fertilization in the vegetable kingdom produces the same results.[3] There is abundant evidence tending to show that what is true of plants and the lower animals is true also of man. "Taking all these facts into consideration," says Westermarck, in closing his argument, "I cannot but believe that consanguineous marriages, in some way or other, are more or less detrimental to the species. And here, I think, we may find a quite sufficient explanation of the horror of incest; not because man at an early stage recognized the injurious influence of close intermarriage, but because the law of natural selection must inevitably have operated. Among the ancestors of man, as among other animals, there

[1] WESTERMARCK, *op. cit.*, chap. xiii, and compare chap. xv, 334 ff.

[2] On sterility as the result of crossing in species, see WALLACE, *Darwinism*, 152-86; DARWIN, *Animals and Plants under Domestication*, II, 78 ff.; and on the good effects of crossing and the evil effects of close interbreeding, *ibid.*, II, 92-126, 104. *Cf.* QUATERFAGES, *The Human Species*, 85-88 (crossing species), 276-86 (effects of crossing in mixed races); MITCHELL, "Blood-Relationship in Marriage," in *Memoirs of London Anth. Society*, *1865*, II, 402-56; and WITHINGTON, *Consanguineous Marriages*, 2 ff., who believes the injurious effects of such unions on the offspring have been overestimated. On the other hand, it has been maintained that under primitive conditions the advantages of close intermarriage may have outweighed all disadvantages: MUCKE, *Horde und Familie*, 245-47, combating Westermarck's view.

[3] DARWIN, *Effects of Cross and Self-Fertilization in the Vegetable Kingdom*, 436.

was no doubt a time when blood-relationship was no bar to sexual intercourse. But variations, here as elsewhere, would naturally present themselves; and those of our ancestors who avoided in-and-in breeding would survive, while the others would gradually decay and ultimately perish. Thus an instinct would be developed which would be powerful enough, as a rule, to prevent injurious unions. Of course it would display itself simply as an aversion on the part of individuals to union with others with whom they lived; but these, as a matter of fact, would be blood-relations, so that the result would be the survival of the fittest. Whether man inherited the feeling from the predecessors from whom he sprang, or whether it was developed after the evolution of distinctly human qualities, we do not know." [1]

Exogamy appears, then, to be the result of natural selection, arising "when single families united in small hordes. It could not but grow up if the idea of union between persons intimately associated with one another was an object of innate repugnance." Conversely, the law of similarity enables us to understand the coexistence of clan-exogamy

[1] CUNOW, *Australneger*, 184 ff., rejects Westermarck's theory, first, on the ground that the prohibition of intermarriage in the cases cited often extends far beyond the local group; and secondly, because where the members of a *gens* do not at the same time form a local community, marriage is not forbidden in the group of persons actually living together. But Westermarck is dealing with origins; and he does not mean to say that all the existing complex systems of kinship which have gradually been developed through association of ideas or other influences actually now conform to the principle for which he contends. On the other hand HELLWALD, *Die menschl. Familie*, 178 ff., following WAGNER, in *Kosmos*, 1886, I, 21, 24-34, reaches a conclusion essentially like that obtained by Westermarck. He finds the origin of exogamy in a dread of close intermarriarge producing a horror of incest. During the period of the endogamous mother-group such marriages were the rule. With the rise of fixed habitations for the group, beginning in the glacial age and carried farther in the diluvial period, came more permanent sexual relations, the prototype of real marriage. This close living together, because of its deadening effect on sexual attraction, produced a dislike of unions in the group, leading to exogamy, often accompanied by wife-capture; although neither rape nor exogamy must be regarded as a universal stage of social evolution. CRAWLEY, *Mystic Rose*, 222, 223, 443 ff., rejects Westermarck's theory of a general human "instinct" against inbreeding. He insists that neither incest nor promiscuity was "ever anything but the rarest exception in any stage of human culture, even the earliest; the former being prevented by the psychological difficulty with which love comes into play between

and tribal endogamy. The one springs from a horror of sexual union between persons who are too near; the other arises in a dislike of connection between those who are too remote. Among primitive men, and sometimes even among those well advanced in civilization, there exists a shrinking from physical contact with strange races only less violent than the aversion which the dread of incest excites. But this prejudice yields to the sympathy produced by the growing similarity of interests, ideas, sentiments, and general culture among men. Sympathy, upon which affection mainly depends, has widened the sphere of sexual selection.[1]

IV. THE PROBLEM OF THE SUCCESSIVE FORMS OF THE FAMILY

From the preceding analysis it will appear, we trust, that scientific examination of the problems of kinship and exogamy has disclosed something of the real origin of the laws which govern human sexual relations. The searching

persons either closely associated or strictly separated before the age of puberty, a difficulty enhanced by the ideas of sexual taboo, which are intensified in the closeness of the family circle, where practical as well as religious considerations cause parents to prevent any dangerous connections." Westermarck's theory, he holds, does not account for all the facts; for example, "that to no little extent brothers and sisters, mothers and sons, fathers and daughters, do *not* live together. This is a result of sexual taboo, and is originally a part of the cause why such marriage is avoided, and not a result of avoidance of incest." In short, it "is the application of sexual taboo to brothers and sisters, who, because they are of opposite sexes, of the same generation, and are in close contact, and for no other reasons, are regarded as potentially marriageable, that is the foundation of exogamy and the marriage system." *Cf.* LANG, *Social Origins*, 10–34, 238–40 note, whose criticism of Westermarck and McLennan follows similar lines; and ATKINSON, *Primal Law*, 209–40, who believes that jealousy may have set up a bar to sexual unions within the "fire-circle" before totems or the idea of incest arose.

[1] Consult the very interesting chapter of WESTERMARCK on "Selection as Influenced by Affection and Sympathy, and by Calculation," *op. cit.*, 356 ff. "Affection depends in a very high degree upon sympathy. Though distinct aptitudes, these two classes of emotions are most intimately connected: affection is strengthened by sympathy, and sympathy is strengthened by affection. . . . . If love is excited by contrast, it is so only within certain limits. The contrast must not be so great as to exclude sympathy."—*Ibid.*, 362. "Civilization," he adds, "has narrowed the inner limit, within which a man or woman must not marry;" while "it has widened the outer limit within which a man or woman *may* marry and generally marries. The latter of these processes has been one of vast importance in man's history."—*Ibid.*, 376.

criticism to which the theory of polyandry has been subjected, in connection with the opposite custom of polygyny, carries us still nearer the truth. For, in the light of recent research, it does not seem entirely hopeless to discover a trace of the actual sequence in which, according to natural law, the general forms of marriage and the family have been evolved.

According to McLennan, it will be remembered, polyandry originates in a scarcity of women due to female infanticide; and it is a universal phase of social progress through which transition is made from promiscuity and the system of kinship in the female line to the paternal system and higher types of family life. Furthermore, he seems to think, though on this point he is not very clear,[1] that polygyny may grow out of polyandry through the practice of capturing wives. This theory has by no means gone unchallenged.[2] It has been shown, in the first place, that the extent to which the custom of polyandry has prevailed is greatly exaggerated. Though it is found among various peoples in different parts of the world, its occurrence is on the whole comparatively rare; and the practice is much less extended than that of polygyny. Its former existence cannot be inferred from such customs as the niyoga and the levirate; for these are capable of simpler explanation.[3] It is highly probable, as Starcke urges, that they are merely expedients for procuring an heir or for conveniently regulating the succession to property and authority,[4] particularly in the joint family; but

[1] McLENNAN, *Studies*, I, 116, *passim; cf.* SPENCER, *Principles of Sociology*, I, 679.

[2] See, especially, WESTERMARCK, *op. cit.*, chaps. xx-xxiii; STARCKE, *Primitive Family*, 128-70; WAKE, *Marriage and Kinship*, chaps. v, vi, vii; and compare HELLWALD, *Die mensch. Familie*, 241 ff. For the literature of polyandry, see p. 80, n. 2, above.

[3] For the literature relating to the levirate and similar customs, see above p. 84, n. 2.

[4] This may be the explanation of the levirate among the Todas: MARSHALL, *A Phrenologist amongst the Todas*, 206-9, 213. Similar practical motives influenced the rise of the levirate elsewhere: DORSEY, "Omaha Sociology," *III. Rep. of Bureau of Eth.*, 258; *cf.* MARTIUS, *Ethnographie*, 117, notes; *idem*, *Rechtszustande*, 64.

there is no good reason to doubt that Spencer's explanation is adequate in some cases. "Under early social systems," he declares, "wives, being regarded as property," are inherited like other possessions.[1] The procuring of an heir through a brother or some other third person harmonizes with the "juridical character of fatherhood among primitive men."[2]

Again, not only is the general extent of polyandry limited, but even where it exists it is confined in almost every case "to a very small part of the population."[3] It is sometimes restricted to the poorer classes, sometimes to the rich; and nearly always it is found side by side with polygyny or monogamy. There is another limitation, already noticed, which tells very strongly against the theory of its origin in promiscuity. Polyandry usually shows a tendency in the direction of monogamy. Sometimes each of the husbands lives with the wife during a certain period, while the others are absent; or frequently, "as one, usually the first married, wife in polygynous families is the chief wife;" so also, "one, usually the first, husband in polyandrous families is the chief husband." In him authority and the property are vested, and all the children, even, are feigned to be his.[4]

[1] SPENCER, *Principles of Sociology*, I, 679–81, 748 ff., 750. See, however, the criticism of STARCKE, *op. cit.*, 151–53, 159 ff.; and compare WESTERMARCK, *op. cit.*, 510 ff.; MCLENNAN, *Studies*, I, 108 ff.; *Fortnightly Review* (1877), 701; and SPENCER'S "Short Rejoinder," *ibid.*, 897. But elsewhere Spencer thinks the levirate may arise in the duty of caring for the brother's children—a general cause of polygyny: *op. cit.*, 691, 692. For examples of inheritance of widows, see KOHLER, "Das Recht der Azteken," *ZVR.*, XI, 54; "Das Negerrecht, namentlich in Kamerun," *ibid.*, XI, 416, 423; and for widower inheritance among the Chins, *idem*, *ibid.*, 186 ff.

[2] STARCKE, *op. cit.*, 141 ff. For his theory of juridical fatherhood see *ibid.*, 121–27, 135, 139; and compare the similar view of WAKE, *Marriage and Kinship*, 78 ff. This author gives an interesting discussion of the case of Boaz and Ruth, *op. cit.*, 172–78, which may be compared with MCLENNAN, *Studies*, I, 109 n. 3. On the evidence for juridical fatherhood among the Arabs, consult SMITH, *Kinship and Marriage*, 119, 120.

[3] WESTERMARCK, *op. cit.*, 455–57.

[4] *Ibid.*, 457–59, 115–17; *cf.* especially STARCKE, *op. cit.*, 135. HELLWALD, *Die mensch. Familie*, 264 ff., gives many interesting details.

In opposition to the theory of McLennan various explanations of the origin of polyandry have been advanced. Spencer regards both polygyny and polyandry as mere limitations of promiscuity. "Promiscuity may be called indefinite polyandry joined with indefinite polygyny; and one mode of advance is by diminution of the indefiniteness." Polyandry, therefore, does not originate in scarcity of women; nor can it be due to poverty; "though poverty may, in some cases, be the cause of its continuance and spread." It is rather one of several independent "types of marital relations emerging from the primitive unregulated state; and one which has survived where competing forms, not favored by the conditions, have failed to extinguish it."[1] Hellwald holds a similar view.[2] Robertson Smith traces its origin to the practice of capturing or of purchasing wives in common by a group of kinsmen; and in the case of purchase, poverty or the high price of women must have exerted a favorable influence.[3] Not entirely dissimilar is the view of Wake who, rejecting the hypothesis of McLennan, believes that polyandry can be satisfactorily explained "only as being established, under the pressure of poverty, either independently or as an offshoot from the phase of punaluan group marriage in which several brothers have their wives in common."[4] Starcke in like manner finds that it "is adapted in every

[1] SPENCER, *Principles of Sociology*, I, 673–75, 678, 679. Insufficient food-supply may cause polygynic and monogamic families to die out; and it is favorable to the survival of the polyandrous family. But the infertility of polyandrous families is unfavorable to their survival, for there are fewer members available for defense.—*Ibid.*, 681.

[2] Polyandry is favored by poverty and scarcity of women; but it is essentially the outgrowth of ancient sexual relations: HELLWALD, *op. cit.*, 258–61; agreeing with LIPPERT, *Kulturgeschichte*, II, 10. MARSHALL, *A Phrenologist amongst the Todas*, 223 ff., follows Lubbock and McLennan in regarding polyandry as a survival of communism. On the other hand, FRITSCH, *Die Eingeborenen Süd-Afrikas*, 227, is decidedly of the opinion that polyandry among the Kafir Herero is the direct result of poverty and low condition (*niedrige Gesinnung*); it is, he says, "keine Sitte, sondern eine Unsitte," harmonizing with the laxity of their moral ideas.

[3] SMITH, *Kinship and Marriage*, 125 ff., 128.

[4] WAKE, *Marriage and Kinship*, 172, 134–78.

respect to this organization of the joint family group." In its highest forms "it is only the eldest brother who is married," and "the younger ones are not husbands, but merely specially authorized lovers. There is nothing to indicate that the band of brothers, as such, take a wife in common; that is, that the marriage is the act of the whole community." Hence "polyandry belongs to the category of facts which have to do with the ordinary family communism;" and it does not forfeit its character of a marriage in which the individual does not quite lose his personality in the group.[1]

More satisfactory, from a scientific point of view, is the result of Westermarck's inquiry. This is so, not only because we feel that he is probably right in his conclusion, but because his argument affords an excellent illustration of the success with which the statistical method may be applied to social questions. The way for a solution of the problem had been prepared by McLennan and his critics. They had established a strong probability that poverty and scarcity of women are in some intimate way connected with polyandry. Westermarck shows that there is, in fact, a close relation, but that relation is a consequence of natural selection. The ultimate causes of polyandry, he demonstrates, are identical with the forces which have produced a numerical disparity between the sexes.[2] First of all the assumption[3] that "monogamy is the natural form of human marriage because there is an almost equal number of men and women," is proved to be untenable by an appeal to the statistics of population,

[1] STARCKE, *op. cit.*, 135, 139, 128–70.

[2] WESTERMARCK, *op. cit.*, chap. xxi, in connection with chaps. xx and xxii.

[3] Thus LORD KAMES, *Sketches of the History of Man*, I, 277 ff., declares "polygyny to be an infringement of the law of nature, basing his opinion on the false assumption that, 'in all countries and at all times,' males and females are equal in number, and supporting it by the consideration that the 'God of nature has enforced conjugal society, not only by making it agreeable, but by the principle of chastity inherent in our nature.'"—WAKE, *op. cit.*, 198 ff., who shows this assumption to be unfounded.

which reveal a considerable variation in the numerical proportion of the sexes. Among many peoples the men are greatly in majority; among others there is a corresponding surplus of women. This disparity is in part easily explainable by referring to the varying conditions of life among different peoples. The "preponderance of women," for instance, "depends to a great extent upon the higher mortality of men" due chiefly to the "destructive influence of war" and the other dangers and hardships to which primitive men are exposed. On the other hand, the surplus of men may, in some degree, be ascribed to female infanticide and, still more, to the severe labor and harsh treatment which usually fall to the lot of women among low races.[1]

But such causes are by no means entirely adequate to account for the numerical inequality of the sexes. For, in the second place, statistics show a considerable disparity between them at birth. "Among some peoples more boys are born, among others more girls; and the surplus is often considerable." With the Todas, for instance, are found about 100 boys to 80 girls under fourteen years of age;[2] while in Mesopotamia, Armenia, Syria, the Arabias, the Holy Land, and in various other portions of Asia, two, three, or even four women to one man are born.[3] "In Europe, the average male births outnumber the female by about five per cent. . . . . But the rate varies in different countries. Thus, in Russian Poland, only 101 boys are born to 100 girls; whilst, in Roumania and Greece, the proportion is 111 to 100."[4]

[1] The facts are collected by WESTERMARCK, with elaborate reference to authorities: *op. cit.*, 460–66.

[2] MARSHALL, *A Phrenologist amongst the Todas*, 100; WESTERMARCK, *op. cit.*, 467.

[3] BRUCE, *Travels to Discover the Sources of the Nile*, I, 284 ff.; WESTERMARCK, *op. cit.*, 467, 468.

[4] OETTINGEN, *Moralstatistik in ihrer Bedeutung für eine Socialethik*, 55; WESTERMARCK, *op. cit.*, 469. DARWIN, *Descent of Man*, chap. viii, discusses the numerical proportion of the sexes, showing their inequality. *Cf.* PLOSS, *Das Weib*, I, 244–46, giving a table of the number of male and female births for European countries and for several of the commonwealths of the United States, the male predominating.

At this point Westermarck finds it necessary to consider the problem of the "causes which determine the sex of the offspring." The view that sex is influenced either by the relative or by the absolute age of the parents is untenable;[1] nor can the theory be accepted that "polygyny leads to the birth of a greater proportion of female infants."[2] The theory of Düsing, however, must be regarded as the most probable explanation which has yet been advanced.[3] According to him, "the characters of animals and plants which influence the formation of sex are due to natural selection. In every species the proportion between the sexes has a tendency to keep constant, but the organisms are so well adapted to the conditions of life that, under anomalous circumstances, they produce more individuals of that sex of which there is the greatest need. When nourishment is abundant, strengthened reproduction is an advantage to the species, whereas the reverse is the case when nourishment is scarce. Hence — the power of multiplication depending chiefly upon the number of females — organisms, when unusually well nourished, produce comparatively more female

[1] Thus, according to SADLER, *The Law of Population*, II, 333 ff., and HOFACKER AND NOTTER, *Ueber die Eigenschaften welche sich bei Menschen und Thieren von den Eltern auf die Nachkommen vererben*, "more boys are born if the husband is older than the wife, more girls if the wife is older than the husband." But Noirot and Breslau have reached the opposite result; and Berner, from Norwegian statistics, has shown that "the law is untenable." From the registers of births in Alsace-Lorraine, STIEDA, *Das Sexualverhältniss der Geborenen*, proves "that neither the relative nor the absolute ages of the parents exercise this sort of influence." Platter "concludes from the examination of thirty million births that the less the difference in the age of the parents the greater is the probability of boys being born." For these authorities and others see WESTERMARCK, *op. cit.*, 469, 470; and compare THOMPSON AND GEDDES, *Evolution of Sex*, 32 ff., for a review of theories, particularly the comparative table, p. 35, and the bibliography, p. 40.

[2] The authorities are compared by WESTERMARCK, *op. cit.*, 470; and there is an interesting discussion of this point by WAKE, *Marriage and Kinship*, 223 ff. *Cf.* DARWIN, *Descent of Man*, chap. viii, 215 ff. PLOSS, *Das Weib*, I, 239-44, gives a comparative view of the notions of various peoples as to the knowledge of sex before the birth of the child.

[3] DÜSING, *Die Regulierung des Geschlechtsverhältnisses bei der Vermehrung der Menschen, Tiere, und Pflanzen* (Jena, 1884), 121-237.

offspring; in the opposite case, more male."[1] The observations of Ploss[2] and others[3] appear to sustain Düsing's hypothesis. Wherever nourishment is scarce there seems to be a surplus of male births. Such is the case in highlands as compared with lowlands; among the poor as compared with the rich; in sterile regions as compared with those that are more fertile. Furthermore, Düsing has suggested a second cause due also to natural selection, which influences the numerical proportion of the sexes born; and his conclusion is confirmed by the researches of Westermarck. Mixture of race among animals and plants appears to cause a surplus of female births;[4] while, on the contrary, incestuous unions, being injurious to the species, "have a tendency to produce an excess of male offspring."[5] So, among half-breeds, the number of girls usually predominates;[6] while among in-and-in bred plants, animals, or men the reverse is the case. Hence it seems probable "that the degree of differentiation in the sexual elements of the parents exercises some influence upon the sex of the offspring, so that, when the differentiation is unusually great, the births are in favour of females; when it is unusually small, in favour of males."[7]

Now, it is a significant fact that polyandrous peoples show a tendency to close intermarriage among kindred;

[1] As summarized by WESTERMARCK, *op. cit.*, 470, 471.

[2] PLOSS, *Ueber die das Geschlechtsverhältniss der Kinder bedingenden Ursachen*, 21 ff., 30, *passim*.

[3] Compare GEDDES AND THOMPSON, *Evolution of Sex*, 32-54, who discuss the literature relating to sex-determination; and GEDDES, article "Sex" in *Encycl. Brit.* See the bibliographies of the subject in GEDDES AND THOMPSON, *op. cit.*, 40, 53, 54. MARSHALL, *A Phrenologist amongst the Todas*, 110, 111, regards the tendency to produce more males than females as due to natural selection, practiced by an in-and-in breeding people, made necessary originally by female infanticide. Thus a "male-producing variety of man is formed."

[4] Consistent with the rule is the fact that the majority of illegitimate births are female.

[5] DÜSING, *op. cit.*, 237.

[6] POWERS, *Tribes of California*, 403, 149; STARCKWEATHER, *The Law of Sex*, 159 ff.; WESTERMARCK, *op. cit.*, 476-80, who cites many other authorities.

[7] *Ibid.*, 481, 482.

while polyandrous countries are notoriously poor. "The Todas of the Neilgherry Hills," for instance, "are probably the most in-and-in bred people of whom anything is known," and among them "the disproportion between male and female births is strikingly in favour of the males." But the "coincidence of polyandry with poverty of material resources" cannot depend, as often asserted, "upon the intention of the people to check an increase of population, or upon the fact that the men are not rich enough to support or buy wives for themselves." For only in Tibet, with her nunneries, among such peoples, is there found a class of unmarried women, and polyandry is often seen in rich families; while in Ceylon "it prevails chiefly among the wealthier classes." With pastoral and agricultural peoples poverty would be no reason for the avoidance of individual marriage, since women are valuable for their labor and "fully earn their own subsistence." In some districts of the Himalayas, we are told, "it is the poor who prefer polygamy, on account of the value of the women as household drudges."[1]

Accordingly as a general result of his argument, Westermarck concludes that there is some reason to believe that polyandry originates in a surplus of men "due, on the one hand, to poor conditions of life, on the other, to close intermarrying. As a matter of fact, the chief polyandrous peoples either live in sterile mountain regions, or are endogamous in a very high degree."[2] It does not follow, however, that a surplus of men will always produce polyandry, any more than a plurality of women will always lead to polygyny. Other conditions must be favorable. "This practice presupposes," for instance, "an abnormally feeble disposition to

[1] WESTERMARCK, *op. cit.*, 475, 476, citing STULPNAGEL, in *Indian Antiquary*, VII, 135. *Cf.* SPENCER, *Principles of Sociology*, I, 688.

[2] WESTERMARCK, *op. cit.*, 482, 483. *Cf.* MARSHALL, *A Phrenologist amongst the Todas*, 110, 111, 221, *passim*, for illustrations.

jealousy;" and this is actually a "peculiarity of all peoples among whom polyandry occurs."[1]

The evidence adduced seems conclusive that polyandry holds a relatively unimportant place in the sociological history of mankind. It is not of frequent occurrence; it is usually modified in the direction of monogamy; and it always implies a considerable progress in civilization. The case is much the same with polygyny.[2] It is not a mere limitation of promiscuity, as some writers believe,[3] but usually makes its appearance comparatively late in social history. It is found side by side with polyandry and does not grow out of it, as McLennan supposes. Finally, like polyandry, its importance as a form of sexual relations has been greatly magnified. True, polygyny is much more widely dispersed than polyandry, being found perhaps among the majority of races both in ancient and modern times.[4] Its rise is particularly favored by the economic and social forces which produce the patriarchal system.[5] But, on the other hand, among many barbarous peoples it is "almost unknown or even prohibited." Monogamy appears to be the *prevailing* form of the family precisely among peoples least advanced in general culture

[1] WESTERMARCK, *op. cit.*, 515.

[2] On polygyny see SWINDEREN, *Disputatio de polygynia* (1795); WEINHOLD, *Die deutschen Frauen*, II, 13 ff.; POST, *Familienrecht*, 63 ff.; *Geschlechtsgenossenschaft*, 17 ff., 26 ff.; KOVALEVSKY, *Tableau*, 101 ff.; HELLWALD, *Die mensch. Familie*, 367–437; MASON, *Woman's Share in Primitive Culture*, 222 ff.; DARWIN, *Descent of Man*, chaps. viii, xx; LUBBOCK, *Origin of Civilization*, 143; LETOURNEAU, *L'évolution du mariage*, chaps. viii, ix, x, xi; WAKE, *Marriage and Kinship*, chap. vi; SPENCER, *Principles of Sociology*, I, 682–97; STARCKE, *Primitive Family*, 261 ff., *passim*; WESTERMARCK, *Human Marriage*, 431 ff., and Index. For examples of polygyny see KOHLER, in *ZVR.*, VII, 370, 379 (Papuas); VIII, 114 (Dekkan); IX, 324 (Bengal); X, 55 (Azteks); 97–99 (Bombay); XI, 432, 433 (Kamerun); HENRICI, "Das Recht der Epheneger," *ZVR.*, XI, 134; POST, "Die Kodification des Rechts der Amaxosa," *ibid.*, XI, 232, 233; REHME, "Das Recht der Amaxosa," *ibid.*, X, 36.

[3] For instance, SPENCER, *Principles of Sociology*, I, 672, 688.

[4] See the enumeration of polygynous peoples in WESTERMARCK, *op. cit.*, 431–35; SPENCER, *op. cit.*, I, 682, 683; WAKE, *Marriage and Kinship*, 181 ff.; MASON, *Woman's Place in Primitive Culture*, 222 ff.

[5] HELLWALD, *Die mensch. Familie*, 366 ff.; GROSSE, *Die Formen der Familie*, 104 ff.

and particularly in the economic arts.[1] It is highly significant, to take a single example, that among the Dravidian Veddahs of Ceylon, commonly regarded as anatomically and intellectually among the most backward races of mankind, monogamous unions last until death dissolves them. To those still untouched by foreign influences polyandry and polygyny are entirely unknown. There is no prostitution. Conjugal fidelity is remarkable. Free courtship exists. Children are treated with kindness; and in general the Sarasin brothers present a picture of pleasing domestic life among this singular people.[2]

Where polygyny exists it is sometimes the chiefs alone who are "permitted to have a plurality of wives." Besides, just as in the case of polyandry, "almost everywhere it is confined to a very small part of the people, the majority being monogamous." It is so "among all Mohammedan peoples, in Asia and Europe, as well as in Africa." Ninety-five per cent. of the Mohammedans of India, for instance, are said to be monogamists; and in Persia, it is reported, only "two per cent. of the population enjoy the questionable luxury of a plurality of wives." Among the American aborigines monogamy is the rule. Although polygyny widely exists among them, seldom are more than two wives

[1] See the lists of monogamous peoples in WESTERMARCK, *op. cit.*, 435-38; and compare DARWIN, *Descent of Man*, 591; POST, *Familienrecht*, 73; LETOURNEAU, *L'évolution du mariage*, chap. xi; and especially GROSSE, *Die Formen der Familie*, as above summarized, chap. ii.

[2] SARASIN, *Die Weddas von Ceylon*, I, 457-75. These investigators, sustaining Westermarck's view of social evolution, regard the monogamy of the Veddahs as a typical primitive institution. Of course, as KOHLER, *Zur Urgeschichte der Ehe*, 10 ff., 14 ff., urges against Westermarck and the Sarasin brothers, the accumulation of a great number of examples of peoples among whom monogamy prevails does not necessarily constitute proof of the original condition of man. It is possible, for example, that the Veddahs are far advanced beyond their former condition, or, conversely, that they are a degraded race. Still the existence of these examples of the single pairing family among barbarous and savage men, as well as those found among the anthropoid mammals, puts the burden of proof on the other side. At any rate, it must not be lightly assumed that this kind of evidence has been used more critically by the adherents of the theory of promiscuity than by those who take the opposite view.

found.[1] Indeed the numerical proportion of the sexes throughout the world renders it impossible for polygyny to become the general practice.[2]

Polygyny, like polyandry, is modified in several ways in the direction of monogamy. Often, as in Africa[3] and among many American peoples, a "higher position is given to one of the wives, generally the first married." She possesses superior authority and becomes the real mistress of the household. Thus, according to Waitz, among the Eskimo a second wife is seldom taken unless the first is childless; but in polygynous families the first wife has domestic precedence. The same is true generally of the red Indians of the north-

[1] Polygyny is found, for example, among the Innuit, but monogamy is the rule, though marriages are often of very short duration. Occasionally there are two, three, four, or in very rare cases even five wives: TURNER, "Ethnology of the Ungava District," *XI. Rep. of Bureau of Eth.*, 182, 188, 189. Among the Point Barrow Eskimo Murdoch found usually one wife, and never heard of more than two: "Point Barrow Expedition," *ibid.*, 411. "Rich men" among the Thlinkets often have two wives: NIBLACK, "Coast Indians," *Rep. Smith. Inst.*, *1888*, 367, 368; KRAUSE, *Die Tlinkit Indianer*, 220. The Pima Indian has more than one wife when he can support them, for "the wife is the slave of the husband": GROSSMANN, "The Pima Indians of Arizona," *Rep. Smith. Inst.*, *1871*, 415, 416. A Ponca chief married four wives at one time, took them at once to his wigwam, and all got on well: *Rep. Smith. Inst.*, *1885*, 64. The Wyandottes allow polygyny if the wives are taken from different *gentes*, but polyandry is prohibited: POWELL, "Wyandotte Society," *A. A. A. S.*, XXIX, 681. Sometimes "duogamy" is found among the Seminoles: MACCAULEY, in *V. Rep. of Bureau of Eth.*, 495. Among the Sioux "a plurality of wives is required of a good hunter, since in the labors of the chase women are of great service": DORSEY, "Siouan Sociology," *XV. Rep. of Bureau of Eth.*, 225; but the "maximum number of wives that one man (an Omaha Sioux) can have is three, *e. g.*, the first wife, her aunt, and her sister or niece, if all be consanguinities. Sometimes the three are not kindred": *idem*, "Omaha Sociology," *III. Rep. of Bureau of Eth.*, 261; and compare KOHLER, *Zur Urgeschichte der Ehe*, 65 ff., 82, who finds here an evidence of group-marriage. One wife is the rule among the South American Abipones: DOBRIZHOFFER, *Account*, II, 209, 210; and Appiacás: GUIMARÃES, "Memoria," *Revist. Trimens. Hist.*, VI, 307; and in general it is the prevalent form in South America: MARTIUS, *Ethnographie*, II, 104; *idem*, *Rechtszustande*, 53. Two wives is the average number among the *Seri:* MCGEE, in *XVII. Rep. of Bureau of Eth.*, Part I, 279.

[2] For a collation of the facts as to the ratio of polygynists to the whole population among polygynous peoples, consult WESTERMARCK, *op. cit.*, 438–42; *cf.* HELLWALD, *Die mensch. Familie*, 413, 414.

[3] WAITZ, *Anthropologie*, II, 109; but here the subordinate women are not always legitimate wives. *Cf.* GROSSE, *Die Formen der Familie*, 109; FRITSCH, *Die Eingeborenen Süd-Afrikas*, 114, 192, 193, 227, 363.

west coast.[1] Among the Siouan tribes the bride's sisters sometimes become subordinate wives;[2] and usually where there are several, according to Dorsey, the first wife and the last are "the favorites, all others being regarded as servants."[3] The principal Indians among the Brazilian Tupinambás, says Souza, "have more than one wife, and he who has most wives is the most honored and esteemed; but they all yield obedience to the eldest wife and all serve her." She "has her hammock tied up next to that of her husband, and between the two there is always a fire burning."[4] Among various peoples it is required "that the first wife shall be of the husband's rank, whilst the succeeding wives may be of lower birth." Sometimes, as among the Chinese, the ancient Hebrews, and the kings of early Egypt, the secondary wives really hold the position of concubines.[5] Frequently the husband has a favorite whom he treats especially as his wife; or

[1] WAITZ, *op. cit.*, III, 308, 328. In the Ungava District the children of the first wife take precedence: TURNER, *op. cit.*, 190; *cf.* NIBLACK, "Coast Indians," *Rep. Smith. Inst.*, *1888*, 367.

[2] MCGEE, "The Siouan Indians," *XV. Rep. of Bureau of Eth.*, 178.

[3] DORSEY, "Siouan Sociology," *ibid.*, 225. Among the Siouan Omahas, "when a man wishes to take a second wife he always consults his first wife, reasoning thus with her: 'I wish you to have less work to do, so I think of taking your sister, your aunt, or your brother's daughter for my wife. You can then have her to aid you with your work.' Should the first wife refuse, the man cannot marry the other woman. Generally no objection is offered, especially if the second woman be one of the kindred of the first wife. Sometimes the first wife will make the proposition to her husband. . . . . The first wife is never deposed."—*Idem*, "Omaha Sociology," *III. Rep. of Bureau of Eth.*, 261.

[4] SOUZA, "Tratado Descriptivo do Brazil," *Revist. Inst. Hist.*, XIV (1851), 311 ff. Compare MARTIUS, *Ethnographie*, 104–06, 108, 109, notes; *idem*, *Rechtszustande*, 53, 54, 57, 58.

[5] On these modifications see SPENCER, *Principles of Sociology*, I, 694–96; WAKE, *Marriage and Kinship*, 196, 197, 186 ff., 210. "The phases of this custom [wives of different grades] may be practically divided into (*a*) those in which all a man's wives have equal rights, (*b*) and those where there is a superior wife (or wives) and inferior ones, the latter being sometimes legal wives, and at others slave wives or concubines."—WAKE, 197. "The Siamese occupy the almost unique position of having four classes of wives, of which, however, the slave wife answers to the concubines of other forms of polygyny."—*Ibid.*, 197. *Cf.* further, GROSSE, *Die Formen der Familie*, 109; WAITZ, *Anthropologie*, III, 328; HELLWALD, *Die mensch. Familie*, 368, 382 (China), 414; AVERY, "The Indo-Pacific Oceans," *Am. Antiquarian*, VI, 366.

conversely, as among the Abipones,[1] he is "bound by custom or law to cohabit with his wives in turn." Finally, it is important to note that everywhere bigamy, or rather duogamy, is the "most common form of polygyny, and a multitude of wives is the luxury of a few despotic rulers or very wealthy men."[2]

Let us next consider the causes which favor the rise of polygyny. It is highly probable, in countries "unaffected by European civilization," that a surplus of women has exerted an influence in its favor.[3] Thus in India polygyny is found among peoples where there is a plurality of women, and polyandry where the reverse is the case.[4] Among the Kafirs and the aboriginal tribes of North America polygyny usually appears only where the women outnumber the men.[5] This disparity of the sexes may sometimes be due to the ravages of war;[6] but it is more likely, as in the case of polyandry, that it owes its origin to natural selection, abundance of nourishment tending to produce an excess of female births. Polygyny also arises from calculation. According to Wake, "abundance may be said to be the chief inducement to the practice;" and, as a matter of fact, it is usually the wealthier persons among polygynous peoples who indulge

[1] "I have known many who kept the same wife all their lives. But if any Abipon marries several women, he settles them in separate hordes, many leagues distant from one another, and visits first one, then the other, at intervals of a year." —DOBRIZHOFFER, *Account*, II, 210.

[2] WESTERMARCK, *Human Marriage*, 442-50; *cf.* STARCKE, *Primitive Family*, 261, 262.

[3] This is the view of WESTERMARCK, *op. cit.*, 482, as opposed to that of CHERVIN, *Recherches médico-philosophiques sur les causes physiques de la polygamie dans les pays chauds* (Paris, 1812), 38; and he is sustained by GOEHLERT, "Die Geschlechtsverschiedenheit der Kinder in den Ehen," *ZFE.*, XIII, 127. See also SPENCER, *Principles of Sociology*, I, 689, 690; WAKE, *Marriage and Kinship*, 204, 205.

[4] WAKE, *op. cit.*, 205; WESTERMARCK, *op. cit.*, 482; GOEHLERT, *loc. cit.*

[5] SPENCER, *op. cit.*, I, 684, 689, 690; WAKE, *op. cit.*, 205; CATLIN, *North American Indians*, I, 118.

[6] SPENCER, *op. cit.*, I, 689, 690.

in the luxury of many wives.[1] Poverty and the approximate equality of the sexes, Spencer holds, are the natural restrictions of polygyny.[2] Again, "superior strength of body and energy of mind, which gained certain men predominance as warriors and chiefs, also gave them more power of securing women; either by stealing them from other tribes or by wresting them from men of their own tribe."[3] In this way the possession of a number of wives would become a mark of distinction. Consequently polygyny sometimes appears as the special privilege of the ruler or of a class; and, as Spencer suggests, from its association with greatness it may gain popular approbation, just as monogamy may be thought "mean" from its association with poverty. "Even the religious sanction is sometimes joined with the ethical sanction," as among the Chippewayans.[4]

Various other reasons for the rise and spread of polygyny have been advanced. Among these are the motives arising in passion, such as man's love of beauty[5] and variety, and his unwillingness to practice abstinence in certain seasons.[6]

[1] WAKE, *op. cit.*, 179–81; SPENCER, *op. cit.*, 685. So the African has as many wives as he can buy; and only the rich in ancient Mexico indulged in polygyny: WAITZ, *Anthropologie*, II, 108; IV, 130. Among the American Indians the cost and difficulty of feeding them make several wives the privilege of the opulent. Increased labor gives the California Wintun woman increased rights; "for then she extorts monogamy": RATZEL, *History of Mankind*, II, 124, 494 (China and Japan). Compare AVERY, "The Indo-Pacific Oceans," *Am. Antiquarian*, VI, 366.

[2] SPENCER, *op. cit.*, I, 683, 684. *Cf.* STARCKE, *op. cit.*, 261, who says: "It follows from the nature of things . . . . that polygamy can never have been the normal condition of a tribe, since it would have involved the existence of twice as many women as men. Polygamy must necessarily have been restricted to the noblest, richest, and bravest members of the tribe." Spencer holds that polygyny is connected especially with the "militant" stage of society, as opposed to the industrial: *op. cit.*, 706.

[3] SPENCER, *op. cit.*, I, 685, 686. [4] *Ibid.*, 685–88; *cf.* STARCKE, *op. cit.*, 261.

[5] Owing to the hard conditions of life, female beauty fades early among savage and barbarous peoples, sometimes even among those reckoned as civilized. A fresh wife is demanded when the first grows old. In some cases the husband is forbidden by custom to cohabit with his wife until the child is weaned, though suckling may continue two, three, or four years: WESTERMARCK, *op. cit.*, 483–88; PLOSS, *Das Weib*, I, 58, 59 (fading beauty).

[6] WAKE, *Marriage and Kinship*, 202 ff., thus summarizes the causes of polygyny: "*First*, the sterility of the first wife," as in the case of Rachel; "*secondly*,

More powerful than these is the "desire for offspring, wealth, and authority." In certain stages of advancement the more children a man has, the greater are his power and distinction. His "fortune is increased by a multitude of wives not only through their children, but through their labour."[1] For this reason, in some cases where jealousy is weak, women cling to polygyny; since by sharing the toil with others they hope that its burden may be lessened.[2] Spencer assigns another cause of the rise of polygyny which has enabled it to hold its ground even against the superior type, monogamy. For "under rude conditions," he believes that "it conduces in a higher degree to social self-preservation." The loss of population sustained by the ravages of war are thus repaired. A bias in favor of polygyny may be founded which will even come to be sustained by natural selection. "In a barbarous community formed of some wifeless men, others who have one wife each, and others who have more than one, it must on the average happen that this last class will be relatively superior—the stronger and more courageous among savages, and among semi-civilized peoples the wealthier also, who are mostly the more capable. Hence, ordinarily, a greater number of offspring will be left by men having natures of the kind needed. The society will be rendered . . . . not only numerically stronger, but more of its units will be efficient warriors." Furthermore, there will be a "structural advance" as compared with lower types of the family. Paternity is certain; and, where descent is traced in the male line, "inheritance of power by sons becomes possible; and, where it arises, government is better

the length of time during which a woman suckles her child; *thirdly*, the sexual requirements of man while leading a hunting or pastoral mode of life; *fourthly*, the accidental scarcity of men; and, *fifthly*, the luxury or sensuality of man, or the desire for influence and power."

1 WESTERMARCK, *op. cit.*, 489–91; *cf.* STARCKE, *op. cit.*, 261.

2 WESTERMARCK, *op. cit.*, 495, 496; SPENCER, *op. cit.*, I, 688.

maintained." The family cohesion is greater; and "this definite descent in the male line aids the development of ancestor-worship; and so serves in another way to consolidate society."[1] For these reasons chiefly he regards polygyny as a type of marriage higher than polyandry; though he remarks that, "were it not for the ideas of sacredness associated with that Hebrew history which in childhood familiarized us with examples of polygyny, we should probably feel as much surprise and repugnance on first reading about it as we do on first reading about polyandry."[2] But this is too favorable an estimate of the relative social value of polygyny. It is doubtful, to say the least, whether morally and physically it is more favorable to the offspring than polyandry; and it is almost certain that it is far worse in its effects upon the home and condition of women.[3] This fact alone, when considered in all its consequences, far outweighs the alleged relative structural advantages of polygyny, which besides have not been conclusively established.

But, as a rule, neither polygyny nor polyandry is favored by woman, in whom the passion of jealousy is very strongly developed. "Polygyny is an offence against the feelings of women, not only among highly civilized peoples, but even among the rudest savages." It is a noteworthy fact that "among monogamous savage or barbarous races the position of women is comparatively good;"[4] while, on the other

[1] SPENCER, *op. cit.*, I, 688, 689, 690 ff., 697. *Cf.* on causes of polygyny, LUBBOCK, *Origin of Civilization*, 112.

[2] SPENCER, *op. cit.*, I, 682. *Cf.* the similar view of WAKE, *Marriage and Kinship*, 219.

[3] This evil effect Spencer himself emphasizes, though he thinks polygyny favorable to women where the habitat is unfavorable to their self-support and men are scarce: *op. cit.*, I, 692-94. See WAKE, *op. cit.*, 219 ff., for the relatively advanced condition of women under polyandry; and compare HELLWALD, *Die mensch. Familie*, 256 ff., who summarizes opinions as to the influence of polyandry; and GROSSE, *Die Formen der Familie*, 110, who emphasizes the degradation of woman among pastoral polygynists.

[4] WESTERMARCK, *op. cit.*, 496-504.

hand, polygyny is in almost every way degrading to the female sex.[1] Accordingly, under influence of ideas and sentiments favoring the freedom and dignity of woman, both polygyny and polyandry must yield to individual marriage. With woman in its favor monogamy could never be entirely superseded as the type of human marriage. "Polygamy must disappear as soon as a growing development brings into play permanent motives and fundamental forces."[2] Among these forces is the "idea of procreative conditions" entering into the conception of fatherhood. From this follow chastity on the part of the wife, and consequently a limit to the sexual liberty of the husband. Out of this also sprang ancestor-worship, a powerful force in differentiating the monogamic household. "Even in primitive times, the character, or soul—the inward, mysterious being—of the father was supposed to decide the character of the child. . . . . The joy excited by the excellent qualities of a child was first aroused in the breast of a primitive man when that child owed its being to himself, and its excellence was a proof of the excellence of its begetter, that is, of himself. I venture to assert that even now this idea plays the strongest part in what we call the voice of blood. . . . . Vanity, a sentiment which is often condemned, yet not always blameworthy, finds sustenance in the most trivial occurrences of everyday life from the thought, 'Here I trace myself; the child has inherited that tendency from me.'"[3] With advancing culture and the growth of altruism it is inevitable that monogamy should assert its right to prevail over all other forms of the family which have yet appeared among mankind.

[1] The facts are collected by WAKE, *op. cit.*, 210 ff., 198 ff.; *cf.* SPENCER, *op. cit.*, I, 693.

[2] STARCKE, *Primitive Family*, 264.

[3] *Ibid.*, 264-66. On the influence of ancestor-worship and the sense of propriety, see WAKE, *op. cit.*, chaps vii and xii, 227 ff., 234, 435 ff. *Cf.* SPENCER, *op. cit.*, I, 691, 697; and on monogamy, LETOURNEAU, *L'évolution du mariage*, chaps. xix, ii; POST, *Familienrecht*, 72 ff.

So we come back to the starting-point. The complex phenomena of human sexual relations have been examined in the light of scientific criticism and recent research. The result seems unmistakably to show that pairing has always been the typical form of human marriage. Early monogamy takes its rise beyond the border-line separating man from the lower animals. But, considering the aberrations from the type, development has been in a circle.[1] At the dawn of human history individual marriage prevails, though the union is not always lasting. In later stages of advancement, under the influence of property, social organization, social distinctions, and the motives to which they gave rise, various forms of polyandry and polygyny make their appearance, though monogamy as the type is never superseded. "Nothing, indeed, is more favourable to polygyny," says Westermarck, "than social differentiation."[2] In its "highest and regulated form," declares Morgan, "it presupposes a considerable advance of society, together with the development of superior and inferior classes, and of some kinds of wealth."[3] Furthermore there is direct evidence in some cases that a transition from monogamy has actually occurred.[4] At a still more advanced stage of culture, under pressure of those influences which have led to the social elevation of woman, polygyny yields in turn to monogamy. "When the feelings of women are held in due respect, monogamy will necessarily be the only recognized form of marriage. In no way does the progress of mankind show itself more clearly

[1] See STARCKE's masterly summary in chapter vii, "Marriage and its Development," who reaches the conclusion presented in the text. WESTERMARCK, chaps. xxi, xxii, xxiv, obtains practically the same result. Compare also WAKE, *op. cit.*, chap. xii, who holds that group-marriage in the Australian and Punaluan forms is the original type of marriage. Then follow polyandry and polygyny; and these are in turn superseded by monogamy. HELLWALD, *Die mensch. Familie*, 389, declares that polyandry and polygyny are the rule, and in this sense more "natural" than monogamy.

[2] WESTERMARCK, *op. cit.*, 505, 506.

[3] MORGAN, *Systems of Consanguinity*, 477.

[4] WESTERMARCK, *op. cit.*, 507, 508.

than in the increased acknowledgment of women's rights, and the causes which, at lower stages of development, may make polygyny desired by women themselves, do not exist in highly civilized societies. The refined feeling of love, depending chiefly upon mutual sympathy and upon appreciation of mental qualities, is scarcely compatible with polygynous habits; and the passion for one has gradually become more absorbing."[1] But the later monogamy differs from the earlier in one important characteristic. The primitive monogamy "is not a form of marriage which can be regarded as the expression of a marriage law; that is, it is not a form of marriage which is striving for the mastery, and which cannot tolerate other co-existent forms of marriage. On the other hand the later monogamy, which arises from a distinct condemnation of polygamy, or from a secret aversion to it, is characterized by self-assertion, and seeks to exclude other forms of marriage."[2]

For a full understanding of the evolution, which has here been sketched in outline, there remains, however, a fact of primary importance to which but casual reference has thus far been made: the element of contract in the marriage relation. This fact will receive some consideration in the next chapter.

[1] *Ibid.*, 509.

[2] STARCKE, *op. cit.*, 264, 265, 255, 258, 259.

CHAPTER IV

RISE OF THE MARRIAGE CONTRACT

[Bibliographical Note IV.—The literature for this chapter may be more briefly indicated, since it is largely identical with the authorities mentioned in Bibliographical notes I, II, and III. The researches of Starcke, Westermarck, Darwin, Letourneau, and Wake are of primary importance, and marriage by capture and purchase are of course essential parts of McLennan's *Studies* I and II, and the *Patriarchal Theory*. Particularly valuable are the monographs of Dargun, *Mutterrecht und Raubehe* and his *Mutterrecht und Vaterrecht;* Kulischer, "Intercommunale Ehe durch Raub und Kauf," in *ZFE.*, VIII; Kohler, "Studien über Frauengemeinschaft, Frauenraub, und Frauenkauf," *ibid.*, V; Kautsky, "Entstehung der Ehe und der Familie," in *Kosmos*, XII; and Schroeder, *Hochzeitsbräuche der Esten* (Berlin, 1888), containing a description of many curious "survivals." A mass of miscellaneous information relating to marriage customs may also be found in Schmidt, *Hochzeiten in Thüringen* (Weimar, 1863); Wood, *The Wedding Day* (New York, 1869); and especially in the *Hochzeitsbuch* of Düringsfeld (Leipzig, 1871).

For a full and systematic treatment of the matrimonial law and usage of many low races see the various books by Post, especially his *Entwicklungsgeschichte des Familienrechts*, *Anfänge des Staats- und Rechtsleben*, and the *Afrikanische Jurisprudenz.*

Illustrations of matrimonial law and usage may be found in Henrici, "Das Volksrecht der Epheneger," in *ZVR.*, XI; Kohler, "Das Recht der Papuas auf Neu-Guinea," *ibid.*, VII; his "Das Recht der Birmanen," and "Das Recht der Chins," both *ibid.*, VI; Farrer, "Early Wedding Customs," in his *Primitive Manners* (London, 1879); Volkov, "Rites et usages nuptiaux en Ukräine," in *L'anthropologie*, II, III (Paris, 1891-92); Ellis, "Survivals from Marriage by Capture," in *Pop. Sci. Monthly*, June, 1891 (New York, 1891); Loring, "Marriage," in his *A Confederate Soldier in Egypt* (New York, 1884); Blumentritt, *Ethnographie der Philippinen* (Gotha, 1882); and Wessely, "Ein griechischer Heiratscontract vom Jahre 136 n. Ch.," in *Xenia Austriaca*, I (Vienna, 1893). Useful material will likewise be found in Weinhold, *Deutsche Frauen* (Vienna, 1882); Harrison, "Religion and Family among the Haidas" (Queen Charlotte Islands), in *Jour. Anth. Inst.*, XXI (London, 1891); Crawley, "Sexual Taboo," *ibid.*, XXIV (London, 1894-95); his

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"Social Organization and Mode of Government of the Ancient Mexicans," in *Rep. Peabody Museum*, II, 557-699.

Among the many works cited in this chapter which have already been enumerated in preceding Bibliographical Notes especially important are those of Jolly, Leist, Krause, Rossbach, Morgan, Bernhöft, Friedrichs, Spencer, Lubbock, Ploss, Lippert, Robertson Smith, Finck, Grosse, Hellwald, and various writings of Kohler.]

EVERYWHERE among our ancestors, when authentic history dawns upon the institutions of the Germanic race, marriage is effected by means of a contract. The transaction is a contract of sale through which for a price the bride is conveyed by the father or guardian into the bridegroom's hand. But, as will appear later, the element of sale is rapidly taking on a symbolical character. The question arises in the outset as to the antiquity of contract in marriage. Is it of comparatively late origin, as is often assumed? Or can the element of agreement, of consent of the parties, be traced from the very beginning of the human family? Again, what is the character and what the historical significance of marriage by purchase? Is it the earliest form of matrimonial contract, and does it constitute a universal phase of development subsequent to that of capturing women?

I. WIFE-CAPTURE AND THE SYMBOL OF RAPE [1]

According to McLennan, as we have already seen, capture as a means of getting wives is a universal practice among primitive men. It is due to polyandry occasioned by a scarcity of women; it leads to exogamy; and it is generally

[1] For wife-capture see MCLENNAN, *Studies*, I, 31 ff.; II, 57 ff., 268 ff., *passim; Patriarchial Theory*, chap. xiii; POST, *Familienrecht*, 97 ff., 137-57; *Geschlechtsgenossenschaft*, 54 ff.; *Ursprung des Rechts*, 47, 57; *Anfänge*, 209; *Grundlagen*, 229 ff.; 240; *Afrikanische Jurisprudenz*, I, 323 ff.; HELLWALD, *Die mensch. Familie*, 275-86; GROSSE, *Die Formen der Familie*, 105 ff.; ACHELIS, *Entwicklung der Ehe*, 79 ff.; KULISCHER, "Intercommunale Ehe durch Raub und Kauf," *ZFE.*, X, 192 ff.; LETOURNEAU, *L'évolution du mariage*, 110-29; DARGUN, *Mutterrecht und Raubehe;* SCHROEDER, *Hochzeitsbräuche der Esten*, 14 ff.; WESTERMARCK, *Human Marriage*, 383-90; STARCKE, *Primitive Family*, 209 ff., *passim;* LUBBOCK, *Origin of Civilization*, 104-33; GIRAUD-TEULON, *Les origines*, 117 ff.; LIPPERT, *Geschichte der Familie*, 42 ff., 100 ff., 95-118, 148 ff.; *idem*, *Kulturgeschichte*, II, 93 ff., 103, 129; WAKE, *Marriage and*

superseded by contract in the form of wife-purchase.[1] The evidence of the former universality of the custom is derived from two sources: first, the existence of actual wife-capture among many peoples in all parts of the world; second, the symbol of rape in the marriage ceremony or in the preliminary act of taking the woman. The symbol, it is held, can be accounted for only as a survival of real capture. Other writers agree with McLennan in regarding the evidence as conclusive. Such, in effect, is the view of Dargun, though he admits that it cannot with absolute certainty be assumed that capture was ever the only form of marriage recognized.[2] Post, on the other hand, declares that the universality of wife-stealing is beyond question; and he holds that it is a natural incident of the genealogical organization of society. It is connected in the closest manner with the exogamous system peculiar to that organization, appearing as one of the means by which marriage can be brought about between members of different gentile groups. It was, in short, the legal means of procuring a wife.[3]

Nevertheless, a careful study of the facts makes it almost

Kinship, 402-34, 246 ff., 305, 350; KOHLER, "Studien," *ZVR.*, V, 334-68; FRIEDRICHS, "Familienstufen und Eheformen," *ibid.*, X, 212, 213; BERNHÖFT, "Principien des europäischen Familienrechts," *ibid.*, IX, 392-406; LEIST, *Alt-arisches Jus Gentium*, 126 ff.; ZMIGRODSKI, *Die Mutter*, 249 ff.; KAUTSKY, in *Kosmos*, XII, 256 ff., 338 ff.; HILDEBRAND, *Ueber das Problem*, 17 ff.; HEUSLER, *Institutionen*, II, 277-86; MUCKE, *Horde und Familie*, 108 ff., *passim*; SPENCER, in *Various Fragments*, 74 ff., replying to McLennan.

[1] MCLENNAN, *Studies*, I, chaps. ii-vi, *passim*; *Patriarchal Theory*, chap. xiii.

[2] "Ein zweites, bemerkenswertes Factum ist, dass es vergeblich wäre ein Volk finden zu wollen, von welchem direkt erwiesen werden könnte, es schliesse gegenwärtig sämmtliche Ehen auf dem Wege des Raubes, oder habe sie jemals nur auf diesem Wege geschlossen. Daher kann nicht mit voller Sicherheit behauptet werden, der Frauenraub sei je einzige Eheschliessungsform gewesen. Um so wahrscheinlicher ist es, dass er gewöhnliche, vorherrschende Eheschliessungsform war, da sich nur unter dieser Voraussetzung die allgemeine Anwendung der Entführungssymbolik bei den einzelnen Völkern erklären lässt."—DARGUN, *Mutterrecht und Raubehe*, 79, 80.

[3] POST, *Familienrecht*, 137, 138. KOHLER also regards capture as a general stage preceding that of wife-purchase: "Studien," *ZVR.*, V, 336; *idem*, "Indisches Ehe- und Familienrecht," *ibid.*, *ZVR.*, III, 342 ff.; and such also is the view of LIPPERT, *Geschichte der Familie*, 42 ff., 44, 95-118.

certain that the significance of wife-stealing as a sociological element has been greatly exaggerated, and its true relation to marriage strangely misunderstood.[1] It is perfectly natural that savage or barbarous races should seize women as a part of the ordinary spoils of war. Everything portable becomes the prey of the victor. "The taking of women," to repeat the forcible words of Spencer, "is manifestly but a part of this process of spoiling the vanquished." They are "prized as wives, as concubines, as drudges."[2]

Accordingly, it is not difficult to collect examples of the actual capture of women to serve as slaves, mistresses, or wives at the pleasure of the captor. Among the aboriginal American tribes, we are told, the practice is originally found in its "greatest perfection."[3] From Cape Horn to Hudson's Bay women are regarded as legitimate booty. The Horse Indians of Patagonia fight with each other, tribe against tribe, the issues of victory in every case being the "capture of women and the slaughter of men." The Patagonian Oens, or Coin-men, make systematic excursions every year at the time of the "red-leaf" to "plunder Fuegians of their women, dogs, and arms."[4] It is even reported of the Caribs that they depend so much upon the securing of foreign wives in war that nowhere do the women speak the same language as the men,[5] and a similar statement is made concerning the Brazilian Guaycurûs[6] and some other peoples.[7] But in

[1] Such is the view of LETOURNEAU in his able discussion of this subject: "Si pourtant l'on ne peut se dispenser d'étudier spécialement le mariage par capture, c'est qu'on lui a fait jouer en sociologie un rôle capital."—*L'évolution du mariage*, 110 ff.

[2] SPENCER, *Principles of Sociology*, I, 650.

[3] MCLENNAN, *Studies*, I, 31 ff.

[4] *Ibid.*, 32; LETOURNEAU, *op. cit.*, 114; *Voyages of the Adventure and Beagle*, II, 205.

[5] ADAM, *Du parler des hommes*, 2 ff.; MARTIUS, *Rechtszustande*, 55; LETOURNEAU, *op. cit.*, 114; MCLENNAN, *op. cit.*, I, 33, 34; WESTERMARCK, *Human Marriage*, 383; WAITZ, *Anthropologie*, III, 355; DARGUN, *Mutterrecht und Raubehe*, 82. But see CRAWLEY, *Mystic Rose*, 46-48, who believes the difference of language is one of the results of the fear of evil which causes sex-segregation and sexual taboo.

[6] MARTIUS, *Ethnologie*, I, 106, 107; *idem*, *Rechtszustande*, 55, 62.

[7] HELLWALD, *Die mensch. Familie*, 188.

North America the capturing of women for wives has nearly disappeared.

The practice of capturing or forcibly abducting women, though rare, exists among the Hottentots and elsewhere in Africa.[1] It prevails throughout all Melanesia, where abduction is described as the "primitive means of procuring wives or rather slaves, absolutely at the pleasure of the ravisher."[2] It has existed in Tasmania, New Zealand, Samoa, New Guinea, among the Fiji Islanders, throughout the Indian Archipelago, and to a very limited extent in Australia.[3] For the Finnish-Ugrian and Turco-Tartaric peoples proofs of the present or former existence of the practice have been collected.[4]

There are abundant evidences of woman-capture *de facto* among peoples of the Aryan stock. It existed among the ancient Germans;[5] and according to Olaus Magnus, the Scandinavian nations were continuously at war with one another "propter raptas virgines aut arripiendas."[6] The same writer says that it "prevailed in Muscovy, Lithuania, and Livonia;" while among the South Slavonians actual capture "was in full force no longer ago than the beginning of the present century."[7] Such was the case in Servia, where

[1] LETOURNEAU, *op. cit.*, 113, 114; WESTERMARCK, *op. cit.*, 384; POST, *Afrikanische Jurisprudenz*, I, 324 ff.

[2] LETOURNEAU, *op. cit.*, 111.

[3] DARGUN, *op. cit.*, 81; WESTERMARCK, *op. cit.*, 385; FISON AND HOWITT, *Kamilaroi and Kurnai*, 343 ff.; MATHEWS, "Australian Aborigines," *Jour. Roy. Soc., N. S. Wales*, XXIII, 407; SMYTH, *Aborigines of Victoria*, II, 316; SPENCER AND GILLEN, *Native Tribes of Cent. Australia*, 102-5, 554-56.

[4] See especially SCHROEDER, *Hochzeitsbräuche;* BUCH, *Die Wotjäken*, 49 ff.; KOHLER, "Studien," *ZVR.*, V, 334 ff.; and his "Frauenwerbung und Frauenraub im finnischen Heldenepos," *ibid.*, VI, 277 ff.

[5] DARGUN, *op. cit.*, 111-40; WEINHOLD, *Deutsche Frauen*, I, 308-10; GRIMM, *Deutsche Rechtsalterthümer*, 440; WESTERMARCK, *op. cit.*, 387.

[6] WESTERMARCK, *op. cit.*, 387, citing OLAUS MAGNUS, *Historia de gentibus septentrionalibus*, Book X, chap. ii, 328. *Cf.* also MCLENNAN, *op. cit.*, I, 37; and DARGUN, *op. cit.*, 95-97, who gives the passage from Olaus.

[7] WESTERMARCK, *op. cit.*, 387. Compare KOVALEVSKY, *Mod. Customs and Ancient Laws of Russia*, 23, 24.

it was the custom either to lie in wait for a girl of a neighboring village to bear her away as she went out for water or to tend the flocks; or else an armed assault was made upon her home. Murders were thus often committed; for the attacking party were resolved to suffer themselves to be killed rather than give up the girl, and all the inhabitants of the girl's village took part in the fray.[1] According to Dargun, the Slavs are as conspicuous among the Aryans for wife-capture and its survivals as are the Aryans, for the same reason, among the great divisions of mankind.[2] It is not at all unlikely that the custom of wife-stealing existed among the early Romans, even if the story of the Sabine rape be dismissed as merely an ætiological myth to explain the symbol of capture in the marriage ceremony.[3] Without doubt it was also common among the primitive Greeks; and "even now, according to Sakellarios, capture of wives occasionally occurs in Greece."[4] It is found "among the aborigines of the Deccan, and in Afghanistan;"[5] while it was known to the ancient Hindus. The code of Manu mentions capture as one of the eight legal forms of marriage. "The forcible abduction from home of a maiden crying out and weeping, after slaying and wounding her relatives and breaking in, is called the Rāksasa form;" but this is only for the military class.[6]

[1] DARGUN, *op. cit.*, 93, 94; SCHROEDER, *Hochzeitsbräuche*, 18; KULISCHER, "Intercommunale Ehe durch Raub und Kauf," *ZFE.*, X, 197; DÜRINGSFELD, *Hochzeitsbuch*, 73, 77.

[2] DARGUN, *op. cit.*, 92.

[3] *Ibid.*, 100-102; ROSSBACH, *Die römische Ehe*, 214, 215, 328 ff.; LUBBOCK, *Origin of Civilization*, 124; SCHROEDER, *op. cit.*, 16.

[4] WESTERMARCK, *op. cit.*, 386, citing ZMIGRODSKI, *Die Mutter bei den Völkern des arischen Stammes*, 250. For the ancient Greeks see MCLENNAN, *op. cit.*, I, 44-46; DARGUN, *op. cit.*, 99; SCHROEDER, *op. cit.*, 15, 16; ROSSBACH, *op. cit.*, 213. According to HRUZA, *Ehebegründung*, 5; *idem*, *Polygamie und Pellikat*, 79, 94, 95, capture of women for wives existed only in isolated cases among the ancient Hellenes.

[5] MCLENNAN, *op. cit.*, I, 35, citing CAMPBELL'S *Indian Journal* (1864), 400, and LATHAM'S *Descriptive Ethnology*, II, 215.

[6] BURNELL AND HOPKINS, *Ordinances of Manu*, III, vss. 33, 26, pp. 48, 49, 189-91. *Cf.* MCLENNAN, *op. cit.*, I, 42, 43; DARGUN, *op. cit.*, 93; WESTERMARCK, *op. cit.*, 386;

The capture of women for wives is very prominent with savage or barbarous peoples of the Semitic race. "At the time of Mohammed," says Robertson Smith, "the practice was universal" among the Arabs. "The immunity of women in time of war which prevails in Arabia now is a modern thing; in old warfare the procuring of captives both male and female was a main object of every expedition, and the Dîwân of the Hodhail poets shews us that there was a regular slave trade in Mecca, supplied by the wars that went on among the surrounding tribes. . . . . Very commonly these captives at once became the wives or mistresses of their captors—a practice which Mohammed expressly recognized, though he sought to modify some of its more offensive features. Such a connection does not appear to have been, properly speaking, concubinage." The sons of a captive woman suffered no legal disability. "According to Arab tradition the best and stoutest sons are born of reluctant wives. And so Hâtim, the Taite, says:

'They did not give us Taites their daughters in marriage:
but we wooed them against their will with our swords.
'And with us captivity brought no abasement to them: and
they neither toiled in making bread nor boiled the pot.
'But we commingled them with our noblest women: and they
bare us fair sons white of face [*i. e.*, of pure descent].
'How often shalt thou see among us the son of a captive
bride: who staunchly thrusts through heroes when he
meets them in the fight!'"[1]

But nothing can exceed the brutal ferocity with which sometimes the people of Israel supplied themselves with

LETOURNEAU, *L'évolution du mariage*, 115; LEIST, *Alt-arisches Jus Gentium*, 126 ff.; KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 344 ff.; MAYNE, *Hindu Law and Usage*, 76, 77, 80; SCHROEDER, *op. cit.*, 15; JOLLY, *Rechtliche Stellung der Frauen bei den ältern Indern*, 19; *idem*, *Hindu Law of Partition*, 73 ff.

[1] ROBERTSON SMITH, *Kinship and Marriage*, 72–74; *cf.* LETOURNEAU, *op. cit.*, 115, 116; KOHLER, "Das vorislamitische Recht der Araber," *ZVR.*, VIII, 240, 241, 247.

women. The Hebrew Bible contains various striking illustrations of the practice. Contrary to law, which forbade intermarriage with the gentiles, members of the military class were allowed to marry foreign women taken in war.[1] On one occasion the tribe of Benjamin, or rather the remnant of it which had escaped the sword of Israel, stood in sore need of wives; but their brethren had sworn not to give them their daughters in marriage, nor could they legally marry gentile women. "The difficulty of procuring wives for Benjamin—which Israel made its *own* difficulty—was solved by the wholesale slaughter of the inhabitants of Jabez-Gilead, whose population yielded 400 virgins; and next by the men of Benjamin enacting a rape of the Sabines for themselves, each man seizing and carrying off one of the daughters of Shiloh to be his wife, on an occasion when the women met for a festival in certain vineyards near Bethel."[2] In this case the spoils of treachery and war were Jewish women. At another time the alien Midianites were conquered; and at the command of Moses the women and even the male infants which the soldiers had spared were deliberately slaughtered. The virgins alone, thirty-two thousand in number, were kept alive; and these were divided among the people precisely as was the other booty, even the priests, apparently, receiving a share.[3]

It would be a very easy matter to produce further examples of a custom which appears as a simple incident of war and rapine at certain stages of human progress. Everywhere among rude men we find lust and physical force triumphing over the weakness of woman. In the successful foray or in

[1] Deut. 21: 10–14. *Cf.* MCLENNAN, *op. cit.*, I, 43, 44, who calls attention to SELDEN'S treatise on the rules regulating such marriages: *De jure naturali et gentium juxta disciplinam Ebraeorum*, lib. v, cap. xiii, fol. 617.

[2] MCLENNAN, *op. cit.*, I, 46, 47; LETOURNEAU, *op. cit.*, 115; *cf.* Judg., chaps. 20, 21.

[3] Numb., chap. 31; *cf.* LETOURNEAU, *op. cit.*, 115, 116; HELLWALD, *Die mensch. Familie*, 183.

the sack of a town she is treated merely as a part of the prey, becoming the slave, the concubine, or even the wife of the spoiler. "But in these brutal practices," it is patent, "there is nothing which bears even a distant resemblance to marriage."[1] It is highly necessary, as Letourneau rightly insists, to distinguish sharply between rape and the marriage institution. So-called marriage by capture, he declares, is not a form of marriage at all; "it is merely a manner of procuring one or several wives, whatever the matrimonal system in use."[2] As a matter of fact, actual wife-capture usually, perhaps always, coexists with regular forms of marriage. Thus, as we shall presently see, it frequently makes its appearance side by side with wife-purchase; and sometimes the transition from capture to purchase, as a means of procuring wives, may be clearly perceived.

Accordingly Letourneau is of the opinion that the name "marriage by capture" should be reserved for legal and pacific marriages in whose ceremony the symbol of rape appears.[3] But even this is too broad a use of the term, which at most can strictly be applied only to the comparatively small number of cases in which the form of capture is an essential part of the legal ceremony. For the symbol occurs in every shape and in every grade of significance, from the brutal combat of the Australian savage to the harmless prank of casting the old shoe with which among ourselves the wedding festivities are enlivened. It exists in connection with every phase of development, from the rudest savagery to the most advanced type of Aryan culture; and it is found among the same people, sometimes in various forms, side

[1] LETOURNEAU, *op. cit.*, 116.

[2] *Ibid.*, 110. *Cf.* the similar conclusion of BERNHÖFT, "Principien des eur. Familienrechts," *ZVR.*, IX, 392, 393, 394; and GROSSE, *Die Formen der Familie*, 105 ff.

[3] LETOURNEAU, *op. cit.*, 116, 117 ff.

by side with actual capture or associated with the most refined conception of the marriage relation.[1]

A very few illustrations of these curious practices, selected from the mass of material available, must here suffice.[2] Sometimes there is a pretended abduction of the bride by the bridegroom. Among the Eskimo of Cape York, for instance, the marriage is arranged amicably by the parents in the infancy of the parties. Nevertheless the wedding ceremony simulates an abduction. The bride "is obliged by the inexorable law of custom to free herself, if possible, by kicking and screaming with might and main, until she is safely landed in the hut of her future lord, when she gives up the combat very cheerfully, and takes possession of her

[1] DARGUN'S classification of peoples, among whom occurs so-called marriage by capture in its various forms, will be found useful (*Mutterrecht und Raubehe*, 78 ff., 92, 138, 139). They are divided into two major classes:

I. Peoples among whom wife-capture is an essential part of marriage. This class comprehends three grades according to the consent of the guardian (*Gewalthaber*) of the woman:

1. In the first grade fall peoples among whom wife-capture is customary without any regard to the guardian: East Indians, Slavs, Germans, and various non-Aryan peoples.

2. In the second grade fall peoples among whom it is the custom, after the capture is effected, to compound with the guardian by paying a penalty for the abduction or a price for the woman: including Slavs, Lithuanians, modern Greeeks of the Ionian Isles, the Ossetes of the Caucasus, the Germans, and certain non-Aryan peoples.

3. In the third grade are peoples among whom the abduction of the bride, no longer accompanied by actual violence, is a legal requirement, though preceded by consent of the guardian. Besides non-Aryan examples, here are found the Romans, ancient Greeks, Slavs, possibly the Germans.

II. Peoples among whom wife-capture exists as a survival in merely symbolical form and without legal significance. Examples among nearly all peoples in every stage of advancement.

Cf. the similar classification of POST, *Familienrecht*, 139, 140.

[2] On the form of capture, see DARGUN, *op. cit.*, 86–92, 102 ff., 111 ff.; HELLWALD, *op. cit.*, 286–305; GROSSE, *Die Formen der Familie*, 105 ff.; SCHROEDER, *Hochzeitsbräuche*, 14 ff.; KOHLER, "Studien," *ZVR.*, V, 334 ff.; and for examples, KOHLER'S papers in *ZVR.*, VII, 371 (New Guinea); VI, 333, 339, 399 (Roumania); IX, 325 (Bengal); XI, 57 (Azteks), 436 (Kamerun); REHME, "Das Recht der Amaxosa," *ZVR.*, X, 38; LETOURNEAU, *op. cit.*, 117–29; MCLENNAN, *op. cit.*, I, 9–21; WESTERMARCK, *op. cit.*, 382–90; POST, *Geschlechtsgenossenschaft*, 54 ff.; *Familienrecht*, 137–57; STARCKE, *Primitive Family*, 212 ff., 262; and illustrations in SCHMIDT, *Hochzeiten in Thüringen*, 33, 36, 40; WOOD, *Wedding Day*, 35, 46, 59, 68, 118 ff., 121–44, *passim*; and DÜRINGSFELD, *Hochzeitsbuch*, *passim*.

new abode."[1] In the Ungava District the "sanction of the parents is sometimes obtained by favor or else bought by making certain presents of skins, furs, and other valuables." If no parents are living, the brothers and sisters must be favorable to the union. "When all obstacles are removed and only the girl refuses, it is not long before she disappears mysteriously, to remain out for two or three nights with her best female friend, who thoroughly sympathizes with her. They return, and before long she is abducted by her lover, and they remain away until she proves to be thoroughly subjected to his will."[2] In Greenland a similar practice is found.[3] It appears in some Siouan tribes.[4] Among the Canadian Indians, after a kind of civil marriage is solemnized before the tribal chief, "the groom turns around, makes an obeisance, takes his wife upon his back, and carries her to his tent amid the acclamations of the spectators."[5] Sometimes the affair takes on a more earnest character. Among the Bedouins of Sinai the bridegroom seizes the woman whom he has legally purchased, drags her into her father's tent, lifts her violently struggling upon his camel, holds her fast while he bears her away, and finally pulls her forcibly into his house, though her powerful resistance may

[1] HAYES, *The Open Polar Sea*, 432; quoted by LUBBOCK, *Origin of Civilization*, 118, 119. *Cf.* also, LETOURNEAU, *op. cit.*, 117.

[2] TURNER, "Ethnology of the Ungava District," in *XI. Rep. of Bureau of Eth.*, 188. "I knew of one instance," he adds, "when a girl was tied to a snow house for a period of two weeks, and not allowed to go out." Forcible abduction is referred to by MURDOCH, "Point Barrow Expedition," *ibid.*, IX, 412, 413. The practice also exists at Smith Sound: BESSELS, in *Naturalist*, XVIII, Part IX; MURDOCH, *op. cit.*, 411.

[3] MURDOCH, *op. cit.*, 411, citing EGEDE'S *Greenland*.

[4] BECKWITH, "Customs of the Dakotahs," *Rep. Smith. Inst.*, 1886, Part I, 256 (abduction with purchase). Among the Siouan Indians, according to MCGEE, there is no marriage by capture; but captive women are sometimes espoused and girls are occasionally abducted: *XV. Rep. of Bureau of Eth.*, 178.

[5] CARVER, *Travels*, 374; LETOURNEAU, *L'évolution du mariage*, 118; LUBBOCK, *Origin of Civilization*, 85. A similar custom exists among the Khands of Orissa: LUBBOCK, *op. cit.*, 114; MCLENNAN, *Studies*, I, 13–15; POST, *Familienrecht*, 144.

be the occasion of serious wounds.[1] Especially interesting is the form which symbolical abduction assumes among the Kamtchadales. There the wooer, like Jacob of old, is expected to earn his wife by serving her parents. He takes upon himself a good part of the domestic labor, and the term of service sometimes lasts for a number of years. "This is surely a singular prelude to a forcible marriage by capture; nevertheless, when the period of novitiate has expired, the future spouse must violently and publicly triumph over the resistance of his betrothed. She is cuirassed with garments, thick and superimposed, with straps and with strings. Moreover, she is guarded and defended by the women of her yourt. The marriage is not definitely concluded until the bridegroom, surmounting all these obstacles, succeeds in perpetrating upon his intended, so well protected, a sort of outrage upon her modesty, which she ought to confess by crying out *ni ni* in a plaintive voice. But the women and the maidens of the guard fall upon the assailant with loud cries and heavy blows, pulling his hair, scratching his face, and sometimes throwing him over. Victory often requires repeated assaults, sometimes days of combat. Only when at last it is won and the bride yields herself is the marriage concluded. The night is then passed in the yourt of the wife, who is conducted to the husband's house only on the following day."[2] The sham contest takes a somewhat different form, according to Bancroft, among the Mosquito Indians of Central America. "At noon the villagers proceed to the home of the bridegroom," whom they accompany to the "house of the bride where the young man

[1] DARGUN, *Mutterrecht und Raubehe*, 88, who names many other peoples among whom the like custom prevails. *Cf.* LUBBOCK, *op. cit.*, 123, 113 ff.; BURCKHARDT, *Notes on the Beduins and Wahabys*, I, 263, 108, 234. *Cf.* KOHLER, "Das vorislamitische Recht der Araber," *ZVR.*, VIII, 247, 248.

[2] LETOURNEAU, *op. cit.*, 118, 119; *cf.* LUBBOCK, *op. cit.*, 117, 118. In Kamchatka, according to MÜLLER, *Description de toutes les nations de l'empire de Russie*, II, 89, "attraper une fille est leur expression pour dire marier."—LUBBOCK, 118.

seats himself before the closed entrance on a bundle of presents intended for the bride. The father raps at the door which is partly opened by an old woman who asks his business, but the reply does not seem satisfactory, for the door is slammed in his face." With great difficulty, and only after entreaties, music, and presents have been tried, is the door opened, "revealing the bride arrayed in her prettiest, seated on a crickery, in the remotest corner. While all are absorbed in examining the presents, the bridegroom dashes in, shoulders the girl like a sack, and trots off for the mystic circle," within which a hut has already been erected. This hut he reaches, urged on by the frantic cries of the women, before the crowd can rescue her. "The females, who cannot pass the ring, stand outside giving vent to their despairing shrieks, while the men squat within the circle in rows, facing outward. . . . . After dark the crowd proceeds with lighted torches to the hut, which is torn down, disclosing the married pair sitting demurely side by side. The husband shoulders his new baggage and is escorted to his home."[1] On the other hand, instead of abduction, the simulated flight of the woman is of frequent occurrence. Sometimes she seeks refuge in the house of a relative, or conceals herself in the woods, whence she can only be brought back with more or less violence.[2] Thus in southern California, according to Bancroft, "where an Oleepa lover wishes to marry, he first obtains permission from the parents. The damsel then flies and conceals herself; the lover searches for her, and should he succeed in finding her twice out of three times she belongs to him. Should he be unsuccessful he waits a few weeks, and then repeats the performance. If she again elude his search, the matter is decided against

[1] BANCROFT, *Native Races*, I, 732, 733. For further examples of "ceremonial" capture or abduction, see PEAL, "On the 'Morong,'" *Jour. Anth. Inst.*, XXII, 255; KLEMM, *Kulturgeschichte*, IV, 27 (Tscherkessen).

[2] DARGUN, *Mutterrecht und Raubehe*, 88, 89, 108 ff.; LUBBOCK, *op. cit.*, 118-20.

him."[1] By the Siouan peoples elopement is "considered undignified, and different terms are applied to a marriage by elopement and one by parental consent."[2] Nevertheless, as among the Omahas, the custom is sanctioned. Sometimes, according to Dawson, "a man elopes with a woman. Her kindred have no cause for anger" if he takes her as his wife. "Should a man get angry because his single daughter, sister, or niece had eloped, the other Omahas would talk about him, saying, 'that man is angry on account of the elopement of his daughter!' They would ridicule him for his behavior. La Flèche knew of but one case, and that a recent one, in which a man showed anger on such an occasion. But if the woman had been taken from her husband by another man, her kindred had a right to be angry. Whether the woman belongs to the same tribe or to another the man can elope with her if she consents. The Omahas cannot understand how marriage by capture could take place, as the woman would be sure to alarm her people by her cries."[3]

Among the Kalmucks both abduction and pretended flight are found. According to De Hell, among the noble or princely class, after the bridegroom has arranged with the father for the price of the girl, he "sets out on horseback, accompanied by the chief nobles of the horde to which he belongs, to carry her off." A "sham resistance is always made by the people of her camp, in spite of which she fails not to be borne away on a richly caparisoned horse, with loud shouts and *feux de joie*."[4] A different custom is described by Dr. Clarke. After stipulation of the price the

[1] BANCROFT, *op. cit.*, I, 389.

[2] DORSEY, "Siouan Sociology," *XV. Rep. of Bureau of Eth.*, 242. Compare MCGEE, "Siouan Indians," *ibid.*, 178, who says elopements are sometimes sanctioned.

[3] DORSEY, "Omaha Sociology," *III. Rep. of Bureau of Eth.*, 260, 261.

[4] XAVIER HOMMAIRE DE HELL, *Travels in the Steppes of the Caspian Sea* (London, 1847), 259; cited by MCLENNAN, *Studies*, I, 15. *Cf.* LETOURNEAU, *op. cit.*, 119.

"ceremony of marriage among the Kalmucks is performed on horseback. A girl is first mounted, who rides off in full speed. Her lover pursues: if he overtakes her, she becomes his wife, and the marriage is consummated on the spot." But the race sometimes has a different ending. "We were assured," continues Clarke, "that no instance occurs of a Kalmuck girl being thus caught, unless she have a partiality to the pursuer. If she dislikes him she rides, to use the language of English sportsmen, 'neck or nought,' until she has completely effected her escape, or until her pursuer's horse becomes exhausted, leaving her at liberty to return, and to be afterwards chased by some more favored admirer." [1]

Not less interesting than the forms of flight and abduction is the custom of elopement, implying the connivance or consent of the woman. In Tasmania[2] and in Australia, especially among the Kurnai, etiquette requires that the lover should run away with his betrothed. Contrary to the common opinion, capture of women seldom occurs in Australia, and then only as the result of war between hostile tribes.[3] "The young Kurnai," however, "could acquire a

[1] CLARKE, *Travels*, I, 433; MCLENNAN, *op. cit.*, I, 15, 16. *Cf.* KOEHNE, "Das Recht der Kalmücken," *ZVR.*, IX, 462; DARGUN, *op. cit.*, 89; LUBBOCK, *op. cit.*, 116, 117.

With the Kalmuck case may be compared the following, communicated by Dawson: "One day in 1872, when the writer was on the Ponka Reservation in Dakota, he noticed several young men on horseback, who were waiting for a young girl to leave the mission house. He learned that they were her suitors, and that they intended to run a race with her after they dismounted. Whoever could catch her would marry her; but she would take care not to let the wrong one catch her. La Flèche and Two Crows maintain that this is not a regular Ponka custom, and they are sure that the girl (a widow) must have been a 'mickeda,' or 'dissolute woman.' "—DAWSON, "Omaha Sociology," in *III. Rep. of Bureau of Eth.*, 260.

[2] BONWICK, *Daily Life and Origin of the Tasmanians*, 65, 66.

[3] MCLENNAN, *op. cit.*, I, 38 ff., maintains the prevalence of capture *de facto*, especially in the form of violent abduction; and he is followed by LUBBOCK, *op. cit.*, 111–13. According to FISON AND HOWITT, *Kamilaroi and Kurnai*, 343 ff., women are sometimes (1) stolen from kindred groups; (2) seized in war between related clans; or (3) captured from alien tribes, elopement being of more frequent, and marriage by exchange or gift of less frequent, occurrence. But it should be remembered that elopement and purchase often go together. MR. CURR, *The Australian Race*, I, 108, states that women are very seldom captured from other tribes, the practice being

wife in one way only. He must run away with her. Native marriages might be brought about in various ways. If the young man was so fortunate as to have an unmarried sister, and to have a friend who also had an unmarried sister, they might arrange with the girls to run off together; or he might make his arrangements with some eligible girl whom he fancied and who fancied him; or a girl, if she fancied a young man, might send him a secret message asking, 'Will you find me some food?' And this was understood to be a proposal. But in every such case it was essential to success that the parents of the bride should be utterly ignorant of what was about to take place. It was no use his asking for a wife excepting under most exceptional circumstances, for he could only acquire one in the usual manner, and that was by running off with her."[1] According to Mr. Howitt, marriage by elopement exists among many other Australian tribes. It seems to be the favorite method when the parents of the girl are opposed to the match. In that case, the girl is sometimes severely punished; or the man is supposed to retain her only as the result of a successful combat with her friends, which may prove to be something more than a sham combat.[2]

The examples thus far presented have all been selected from the matrimonial customs of non-Aryan peoples; but the symbol of capture, in a great variety of forms and combinations, may also be found in every subdivision of the Aryan

discouraged for fear of stirring up incessant attacks. *Cf.* WESTERMARCK, *Human Marriage*, 384, 385; and KOHLER, "Das Recht der Australneger," *ZVR.*, VII, 350 ff.

SPENCER AND GILLEN, *Native Tribes of Cent. Australia*, 104, 105, 554-60, name four methods of obtaining wives among these aborigines: (1) charming by means of magic; (2) capture, being of "much rarer occurrence;" (3) elopement, a form "intermediate" between the method of charming and that of capture, often leading to bloody fights; (4) the custom "in accordance with which every woman in the tribe is made *Tualcha mura* [prospective mother-in-law] with some man. This relation is entered into while the male and female are in tender years; so that the boy is thus betrothed to the prospective, unborn daughter of his *Tualcha mura*. This is the usual method of obtaining a wife in the Arunta and Ilpirra tribes.

[1] FISON AND HOWITT, *op. cit.*, 200.

[2] *Ibid.*, 348-55. *Cf.* DAWSON, *Australian Aborigines*, 34.

race. It appears in the marriage ceremonies of Sparta, Crete, and among other Hellenes.[1] The nuptial celebration of the Romans was characterized throughout by the show of force. For this reason they hesitated to hold weddings on religious days, lest these should be desecrated by the seeming violence done to the bride.[2] With the rising of the evening star took place the *domum deductio*, or carrying home, of the woman.[3] The girl fled to the lap of her mother, whence she was dragged forcibly away by the bridegroom and his friends who rushed noisily in.[4] On the way she held back, weeping and struggling, while her attendants sang hymeneal songs, not always the most refined in character. Thus in his nuptial hymn Catullus has the choir of maidens exclaim:

"Say, Hesper, say, what fire of all that shine
In Heaven's great vault more cruel is than thine?
Who from the mother's arms her child can tear—
The child that clasps her mother in despair;
And to the youth, whose blood is all aflame,
Consigns the virgin sinking in her shame!
When towns are sacked, what cruelty more drear."[5]

[1] DIONYSIUS, II, 30; PLUTARCH, *Lives*, I, 133, 134 (Lycurgus); HERODOTUS, Book VI, 65; RAWLINSON, III, 377; MÜLLER, *Doric Races*, II, 278; SMITH, *Dict. of Ant.*, II, 130-38; DARGUN, *op. cit.*, 99, 100; MCLENNAN, *op. cit.*, I, 44 ff., 12 ff.; LUBBOCK, *op. cit.*, 81.

[2] "Feriis autem vim cuiquam fieri piaculare est, ideo tunc vitantur nuptiae, in quibus vis fieri virginibus videtur."—MACROBIUS, *Sat.*, 1, 15; *cf.* DARGUN, *op. cit.*, 100.

[3] The *domum deductio* was the second act in the patrician marriage ceremony of *confarreatio*, and in this case it appears to have been a necessary form. But it was probably also observed, as a nuptial custom, in connection with plebeian free marriages as well as in the *coemptio:* ROSSBACH, *Die römische Ehe*, 92 ff., 116, 145, 155, 328 ff.; *idem*, *Hochzeits- und Ehedenkmäler*, 39-118. *Cf.* MARQUARDT, *Privat-Leben*, I, 38; SMITH, *Dict. of Ant.*, II, 142; FUSTEL DE COULANGES, *Ancient City*, 55 ff.; DARGUN, *op. cit.*, 100 ff.

[4] "Rapi simulatur virgo exgremio matris aut si ea non est, ex proxima necessitudine, cum ad virum trahitur, quod videlicet ea res feliciter Romulo cessit."—FESTUS, *De verb. sig.*, *s. v. Rapi.*

[5] CATULLUS, *Carmina*, LXII, 20-24; MARTIN'S translation, 89. See also CATULLUS, LVI and LXI, for other allusions to Roman wedding customs; and compare OVID, *Metamorphoses*, IV, 75-78; VIRGIL, *Eclogues*, VIII, 30, and SERVIUS, *Commentaria*, *ad hoc loc.* In general, ROSSBACH, *op. cit.*, 328 ff., 359; MARQUARDT, *op. cit.*,

At the door the bride makes a last effort to resist; but she is lifted forcibly over the threshold, and even in the house she is held fast by the arms, until at last she is fully initiated into the sacred rites of the bridegroom's house.[1] It is noteworthy that the custom of dragging the bride into the husband's house, or of lifting her over the threshold, exists even now in many places. It appears in Africa; among the Ests, Kalmucks, and Bedouins; the Indians of southern California, and elsewhere in North America.[2] In "China, when the bridal procession reaches the bridegroom's house, the bride is carried into the house by a matron, and lifted over a pan of charcoal at the door."[3]

The symbol of capture is especially prominent in Celtic song and custom. As in the German epics, it was not thought unseemly for the daughter to marry the hero who had slain her father.[4] "According to tradition the Picts

I, 37-55; FRIEDLÄNDER, *Sittengeschichte*, I, 463-66; BOUCHÉ-LECLERCQ, *Institutions romaines*, 468 ff.; BECKER, *Gallus*, 160, 161, 153-81; PLUTARCH, *Lives*, I, 69-73 (Romulus); SMITH, *op. cit.*, II, 138 ff., 142 ff.; LETOURNEAU, *op. cit.*, 124, 125; WESTERMARCK, *op. cit.*, 386; DARGUN, *op. cit.*, 100 ff.; MCLENNAN, *op. cit.*, I, 13.

[1] DARGUN, *op. cit.*, 101; FUSTEL DE COULANGES, *op. cit.*, 56; ROSSBACH, *op. cit.*, 359.

[2] DARGUN, *op. cit.*, 88; SCHROEDER, *Hochzeitsbräuche*, 88 ff.; LUBBOCK, *Origin of Civilization*, 85, 86, 122, 123; POST, *Geschlechtsgenossenschaft*, 60; MCLENNAN, *op. cit.*, I, 19. BANCROFT gives an interesting description of the custom among the California Indians: "On the appointed day the girl, decked in all her finery, and accompanied by her family and relations, was carried in the arms of one of her kinsfolk toward the house of her lover. . . . . The party was met half-way by a deputation from the bridegroom, one of whom now took the young woman in his arms and carried her to the house of her husband."—*Native Races*, I, 411.

[3] LUBBOCK, *op. cit.*, 86; DAVIS, *The Chinese*, I, 285; LETOURNEAU, *op. cit.*, 144, 145; POST, *op. cit.*, 57.

DARGUN, *op. cit.*, 88, 91, says, besides the custom just mentioned, there is but one other survival of wife-capture among the Chinese — the forbidding of friendly intercourse between the newly wedded husband and the mother-in-law. JAMESON, *China Review*, X, 95, thinks that in China there is no trace of capture; but KOHLER, in *ZVR.*, VI, 405, 406, gives an example of the alleged symbol of rape among the Chinese. *Cf.* NEUMANN, *Asiatische Studien*, I, 112; and WESTERMARCK, *Human Marriage*, 387.

ARAKI, *Japanisches Eheschliessungsrecht*, 9, 10, denies the former existence in Japan of purchase or capture of wives.

[4] DARGUN, *op. cit.*, 102, who refers to the legend of Launcelot and the song of Laudine and Iwein: GERVINUS, *Geschichte der deutschen Dichtung*, 5th ed., I, 447, 449. For the same practice in German songs and epics see DARGUN, *op. cit.*, 119.

robbed the Gaels of their women, so that the latter were compelled to intermarry with aboriginal inhabitants of the land."[1] Near the beginning of last century the following marriage ceremony was customary in Wales: "On the morning of the wedding day the bridegroom, accompanied by his friends on horseback, demands the bride. Her friends, who are likewise on horseback, give a positive refusal, upon which a mock scuffle ensues. The bride, mounted behind her nearest kinsman, is carried off and is pursued by the bridegroom and his friends, with loud shouts. It is not uncommon on such an occasion to see two or three hundred sturdy Cambro-Britons riding at full speed, crossing and jostling, to the no small amusement of the spectators. When they have fatigued themselves and their horses, the bridegroom is supposed to overtake his bride. He leads her away in triumph, and the scene is concluded with feasting and festivity."[2] Still more real is the sham contest in Ireland. As late as the middle of last century, in mountain districts, the bridegroom "was compelled in honor, to run off with his betrothed, even when there was not the least need of it."[3] On the day of home-bringing, after the purchase-contract had been concluded, "the bridegroom and his friends rode out to meet the bride and her friends, at the place where the contract was made. Being come near each other the custom was of old to cast short darts at the company that attended the bride, but at such distance that seldom any hurt ensued. Yet it is not out of memory of man that the Lord of Hoath on such an occasion lost an eye."[4]

[1] McLENNAN, *op. cit.*, I, 68; DARGUN, *op. cit.*, 102.

[2] LORD KAMES, *History of Man* (Edinburgh, 1807), I, 449: McLENNAN, *op. cit.*, I, 18; LUBBOCK, *op. cit.*, 125; DARGUN, *Mutterrecht und Raubehe*, 103.

[3] DARGUN, *op. cit.*, 102, 103.

[4] PIERS, *Description of Westmeath*, quoted by LUBBOCK, 26, 27; see also DARGUN, *op. cit.*, 103.

A custom, almost identical with that last mentioned, prevails in the Punjab;[1] and in many parts of India the sham contest and the pretended abduction appear.[2] But nowhere are the symbols of capture found in such wonderful variety and profusion as in Germany and Slavonic lands. The mass of illustration presented by Dargun is almost bewildering for its richness.[3] Every form and type of ceremonial capture is there represented. Elopement, the sham combat, abduction by an armed band, is the regular order of the wedding day in every country of the Slavonic race. In Germany, besides these practices, reminiscences of capture are found in a great variety of pranks and fantastic sports. The bride is concealed from her lover before the wedding; or, after it takes place, she is stolen and concealed by the young people of the village. The bridegroom is hindered from entering the home of his intended on the wedding day; or he finds his way barred to or from the church, and is permitted to proceed only after paying a fine or treating the crowd.[4] Sometimes, as in Sweden, the bride is stolen by her lover and hidden away.[5] In upper Bavaria, on the day of the wedding, she clothes herself in mourning, black or violet;[6] and the practice of covering or veiling her head is as familiar in Germany as it was in ancient Rome.[7] "To veil the woman," *quên liugan*, is the Gothic name for marriage;

[1] LUBBOCK, *op. cit.*, 115, 116.

[2] POST, *Geschlechtsgenossenschaft*, 58; LUBBOCK, *op. cit.*, 114-16; MCLENNAN, *op. cit.*, I, 13-15. For symbols of rape in India see KOHLER, in *ZVR.*, VIII, 91, 114 (Dekkan); IX, 325 (Bengal); X, 74-77 (Bombay).

[3] For the Slavs see DARGUN, *op. cit.*, 103 ff.; and for the Germans, *ibid.*, 111-40; DÜRINGSFELD, *Hochzeitsbuch*, 22 ff., 65 ff., 113 ff., *passim*.

[4] This custom, in some form, prevails throughout Europe: DARGUN, *op. cit.*, 107 ff., 135 ff. On all these practices compare SCHROEDER, *Hochzeitsbräuche*, 57 ff.

[5] "In Schweden wird die Braut an manchen Orten vom Bräutigam und seinen Gehilfen tief im Heu versteckt gefunden."—DARGUN, *op. cit.*, 132; DÜRINGSFELD, *Hochzeitsbuch*, 9.

[6] WEINHOLD, *Deutsche Frauen*, I, 389; *cf.* DARGUN, *op. cit.*, 130.

[7] DARGUN, *op. cit.*, 130, 131; *cf.* SCHROEDER, *op. cit.*, 72-78.

in Lorraine it is called *Brautjagd*, or "bride-hunt;" while *Brautlauf*, or "bride-race," for the entire nuptial celebration is a common designation in German lands.[1] The original meaning of *Brautlauf* is probably revealed in the existing custom of chasing the bride. Thus, in Altmark, after the wedding feast, followed by a dance, a runaway match takes place between the newly married pair. "Two lusty young fellows take the girl between them, the bridegroom gives her a 'start,' and the race begins. If the lover does not succeed in overtaking her, he must look out for the gibes of the crowd."[2]

As illustration of social custom and mental attitude the extraordinary prevalence of the so-called symbol of capture is undoubtedly a fact of unusual interest; and it constitutes an important chapter in the history of marriage. But it does not follow, as a matter of course, that the symbol must necessarily be regarded as a survival of actual capture. It is scarcely credible that its origin can be traced to a single source. On the contrary, it is far more likely that in different places, or even in the same place, it takes its rise in a variety of causes, though these may be less simple in character. Thus, in spite of the protest of McLennan,[3] who asserts that "no case can be cited of a primitive people among whom the seizing of brides is rendered necessary by

[1] In the *Brautlauf* "eine Beziehung auf den Frauenraub ist anzunehmen, ebenso wie beim analogen Ausdruck 'Brautjagd' in Lothringen, beim altnordischen 'qvânfang, konfang, verfang,' d. h. Frauenfang für Ehe und beim gothischen 'quên liugan' das Weib verhüllen, verschleiern, binden für Heiraten, sowie beim gleichbedeutenden mittelhochdeutschen: 'der briute binden.'" DARGUN, *op. cit.*, 130; *cf.* SCHMIDT, *Hochzeiten in Thüringen*, 40; DÜRINGSFELD, *op. cit.*, 155 ff.

[2] DARGUN, *op. cit.*, 130, 131. WEINHOLD, *op. cit.*, I, 384 ff., gives many examples of similar wedding customs, and SCHMIDT, *Jus primae noctis*, 126-46, discusses the *Brautlauf* and like practices, citing the sources in detail. *Cf.* GRIMM, *Rechtsalterthümer*, 419; *idem*, *Wörterbuch*, II, 336 ff.

[3] MCLENNAN, *op. cit.*, I, 10, criticises MÜLLER, *Doric Races*, Book IV, chap. iv, sec. 2, who accounts for the sign of rape in the Spartan ceremony on the ground of coyness. See also ROSSBACH, *Die römische Ehe*, 328, who holds the same view; and RAWLINSON'S notes, *Herodotus*, Book VI, 65; FINCK, *Primitive Love*, 123 ff., who rejects Spencer's theory.

maidenly coyness," it is highly probable that the real or assumed modesty of the woman has exerted a strong influence, here and there, in producing the form of capture.[1] Sometimes the simpler explanation of Starcke may suffice. Ceremonial capture, he declares, merely represents the "sorrow of the bride on leaving her former home; her close dependance on her family is expressed by her lamentation."[2] Again the symbol may appear as the sign of the subjection or subordination of the wife; for many of the so-called minor survivals seem to have this end in view. In a society where woman, on occasion, is seized in the bloody foray; where, often, she is bought like a beast of burden; and where, generally, she is exposed to the cruelty and brutality of her master, it is not surprising that the token of the wife's humility should find its way into the ceremony of marriage.[3] Furthermore the suggestion of Letourneau is worthy of special consideration. The symbol of rape, he holds, is first of all a "mental survival;" a "tradition" of an epoch more or less remote when violence was held in high esteem and when it was glorious to procure slaves by force of arms. The period of rapine may have passed away, but its spirit lingers. Men love to figure in the ceremonial of marriage the abduc-

[1] Of course, SPENCER'S reply to McLennan, already mentioned, is most important; and his argument has not been overthrown: *Principles of Sociology*, I, 652–56. *Cf.* WESTERMARCK, *Human Marriage*, 388, who favors Spencer's view; and GROSSE, *Die Formen der Familie*, 107, 108, who accepts coyness as a partial explanation, though he believes that the symbol of capture may also be due in some cases to the honor of having wives taken in war, while frequently it may represent in a realistic way the release of the woman from paternal authority and her subjection to the husband's power. HELLWALD, *Die mensch. Familie*, 287 ff., rejects Spencer's explanation, regarding the forms of ceremonial rape as survivals of real capture, marking the transition to wife-purchase and the paternal system; and LIPPERT, *Kulturgeschichte*, II, 86 ff., 92 ff., holds a similar position.

[2] STARCKE, *Primitive Family*, 218, 262. He refers especially to the joint or communal family — the "alpha and the omega" of the community. But his explanation can hardly be accepted as sufficient in all cases.

[3] *Cf.* LETOURNEAU, *L'évolution du mariage*, 117, 128, who holds that the ceremonial of capture especially symbolizes the subjection of woman "achetée ou cédée par les parents; il sanctionnait les droits, presque toujours excessifs, que l'époux acquérait sur l'épousée."

tions of old, which they cannot or dare not any longer commit.[1]

"Connubial and formal capture," according to Crawley, "are very widely spread, but are never survivals of real capture." "In fact, formal capture, far from being itself a survival, either of connubial or of actual hostile capture, is the ceremonial mode of which connubial capture is the non-ceremonial; each is a living reality, the one being material and the other ideal."[2]

Nevertheless, after all is said, it seems hard to believe that ceremonial capture does not sometimes have a more real significance. Often it may symbolize the coyness or mark the subjection of woman. More frequently it may stand as a mere general reminiscence of the good old times of force and lawlessness. Still it would be strange, indeed, if it did not also appear as a direct survival of actual wife-capture.[3] Granting this, however, the significance of capture *de facto* remains the same. We perceive more clearly that it has very widely prevailed; yet it must still be regarded as a mere incident of war and pillage. It has nothing whatever to do with the institution of marriage. It could never on any wide scale have been the normal manner of procuring wives. To assume that wife-stealing has been a universal phase in the evolution of marriage is not one whit more reasonable than to hold that robbery has been a normal stage in the

[1] *Ibid.*, 117. Compare the suggestions of Abercromby, that "marriage *with* capture — by which he understands capture of a bride, associated with some other form of marriage, such as that by purchase — may be regarded rather as a result of the innate universal desire to display courage, than as a survival of a still older practice of taking women captive in time of war."—WESTERMARCK, *op. cit.*, 388, citing ABERCROMBY'S "Marriage Customs of the Mordvins," *Folk Lore*, I, 454. *Cf.* LETOURNEAU, *op. cit.*, 128.

[2] *Mystic Rose*, 368, 370. In harmony with his theory of sexual taboo, he declares that it is "not the tribe from which the bride is abducted, nor, primarily, her family and kindred, but her sex."

[3] This is in effect conceded by Spencer. While rightly rejecting the theory of systematic foreign wife-capture, as a general phase in the development of marriage, he holds that the symbol of rape may sometimes result from struggles for women within the tribe, or from the resistance of the father and male relatives of the bride.

evolution of property.[1] In spite of Hobbes or McLennan, it remains to be proved that a state of chronic hostility was ever a general phase in the history of mankind. Such a state is inconsistent with the prevalence of the blood-feud.[2] Even the rule of exogamy among primitive peoples does not harmonize with general wife capture. For the coexistence of clan-exogamy and tribal endogamy means, under normal conditions, a tendency toward peace within the tribe.[3] There is strong reason to believe that in every period of social development consent and contract, in some form, have been the cardinal elements of marriage. Captured or stolen women have usually become slaves or concubines; and, except in rare instances, the relatively small number of them made wives must always have been insignificant as compared with the number of wives obtained in other ways. Thus the solution of the problem of so-called marriage by capture appears to be similar to that of polygyny. The practice of taking several wives is exceedingly common; but on close examination we discover that polygyny is relatively unimportant, and that it has never been able to displace monogamy as the normal type. So it is with the practice of capturing

[1] "Der Raub begründet die Ehe nur insofern, als er zugleich jenes Zusammenleben herbeiführt; er ist Eheschliessungsform in demselben Sinne, wie er noch nach heutigem Recht als Besitzerwerbsform bezeichnet werden kann." It is only a matter of *Kulturgeschichte* and has no juridical significance.—BERNHÖFT, "Principien des eur. Familienrechts," *ZVR.*, IX, 393.

[2] This is contrary to the common opinion, as expressed, for instance, by DARGUN, *op. cit.*, 84, but it appears to be sustained both by reason and the facts. For an example of the restraint of wife-capture through dread of the feud, see CURR, *The Australian Race*, I, 108. REHME, "Das Recht der Amaxosa," *ZVR.*, X, 40, shows that the harshness of the husband is mitigated by fear of the vengeance of the wife's relatives; and the same fact is noted by FISON AND HOWITT, *Kamilaroi and Kurnai*, 206. *Cf.* KOHLER, "Das Recht der Australneger," *ZVR.*, VII, 349; HELLWALD, *Die mensch. Familie*, 280 ff., 288, 289, 298; LIPPERT, *Geschichte der Familie*, 42; and his *Kulturgeschichte*, II, 86, 87, for the restraining effects of the blood-feud.

[3] This fact is overlooked by McLennan, who, though maintaining that exogamy originates in wife-capture, still believes that the reduction of capture to a system is due to the influence of exogamy. WESTERMARCK, *op. cit.*, 389, makes the same oversight; though, of course, the horror of close intermarriage, in case of inability to purchase, might lead to the occasional breach of custom in the form of wife-stealing.

women for wives. However prevalent the custom, it does not seem ever to have greatly influenced the natural laws or modified the fundamental motives upon which marriage and the family rest. But the value of the evidence upon which this conclusion is based can be thoroughly appreciated only after we have traced the origin of contract in marriage. Let us begin with wife-purchase, especially in its relation to the custom of capturing women.

II. WIFE-PURCHASE AND ITS SURVIVAL IN THE MARRIAGE CEREMONY

It is a common opinion that marriage by purchase supersedes wife-capture as a later and higher stage of development. Such apparently is the view of McLennan, who regards the purchase-contract as of late origin and as the principal means by which the transition from the maternal to the paternal system of kinship and to the individual family was brought about.[1] Post declares that bride-purchase is a universal phase of development, more advanced than that of wife-capture;[2] and he agrees with McLennan in regarding it as a mark of transition.[3] A similar position is taken by Heusler, Lippert, Kulischer, and also by Kohler;[4] while Spencer, without asserting that either is a stage through which marriage among all peoples has passed, thinks that purchase is the usual substitute for violence as civilization progresses.

[1] McLENNAN, *Patriarchal Theory*, 45, 234, 289, 315, 320, 327, 328, 291; *cf.* WAKE, *Marriage and Kinship*, 388 ff.

[2] POST, *Geschlechtsgenossenschaft*, 63 ff.; *Familienrecht*, 175; *Afrikanische Jurisprudenz*, I, 329 ff.; *Ursprung des Rechts*, 56 ff.

[3] POST, *Familienrecht*, 92, 93, 96, 97. Such also is the opinion of WAKE, *op. cit.*, 390 ff.

[4] HEUSLER, *Institutionen*, II, 280; and LIPPERT, *Geschichte der Familie*, 42, 44 ff., 95-118, agree with McLennan in regarding purchase, at first as an alternative for capture, as a general form of marriage through which transition is made to the paternal system of kinship and the modern family; KULISCHER, in *ZFE.*, X, 193, 218, and KOHLER, "Studien," *ZVR.*, V, 336; "Die Ehe mit und ohne Mundium," *ibid.*, VI, 333 ff., take a like position.

"We may suspect," he says, "that abduction, spite of parents, was the primary form; that there came next the making of compensation to escape vengeance; that this grew into the making of presents beforehand; and that so resulted eventually the system of purchase."[1]

It requires little argument, of course, to show that robbery *per se* is a less civilized method of acquiring property than contract. That is as true among ourselves now as it has ever been among savages. For particular individuals, even for particular tribes, a transition from rape to contract, as the result of moral development, will of course take place. It by no means follows, however, that the one method has succeeded the other as a general stage for all mankind, or indeed for a single community. Even if we admit that "barter and commerce are comparatively late inventions of man"[2]—an assumption which, though probable, still requires proof—rape is not the necessary alternative in getting property, much less in getting a wife.

It is highly significant that wife-capture, real or pretended, is usually found side by side with wife-purchase. They appear together among peoples exceedingly low in the scale of progress; while marriage by purchase very frequently occurs among rude races where capture, unless as a mere symbol, is not found at all. Thus in Africa purchase is very common, and it is occasionally accompanied by actual or pretended rape.[3] So likewise real capture and wife-purchase coexist in various parts of Europe, Asia, and America; and wherever ceremonial capture occurs among races not far advanced in civilization it is almost invariably combined

[1] SPENCER, *Principles of Sociology*, I, 655. HELLWALD, *Die mensch. Familie*, 287 ff., takes a similar position.

[2] WESTERMARCK, *Human Marriage*, 400, 389, in opposition to PESCHEL, *The Races of Man*, 209 ff., who "contends that barter existed in those ages in which we find the earliest signs of our race."

[3] KOHLER, "Das Negerrecht," *ZVR.*, XI, 432 ff., 436; "Studien," *ibid.*, V, 350; WESTERMARCK, *op. cit.*, 384; REHME, "Das Recht der Amaxosa," *ZVR.*, X, 38.

with marriage by purchase, or its allied forms, marriage by serving, gift, or exchange.[1]

If, now, the cases in which capture and purchase appear together be carefully examined, decisive evidence is disclosed that the purchase contract is really the normal form of marriage, while capture is usually, if not always, merely an exceptional, even illegal, means of procuring a wife. It is not surprising, for instance, that uncivilized races, with well-established marital institutions, should occasionally steal women from hostile tribes. Thus the Macas Indians of Ecuador "acquire wives by purchase, if the woman belongs to the same tribe, but otherwise by force."[2] In Australia wives are often, perhaps usually, procured by exchange or purchase; and a girl is generally betrothed when a child, sometimes as soon as she is born.[3] Actual woman-capture exists. But, as shown by Mr. Howitt's researches and those of Spencer and Gillen, marriage with a captured woman is only permitted when the captor and the captive belong to groups which may legally intermarry. Death is sometimes the penalty for violation of the class rules in this regard. The result is that in Australia woman-stealing "amounts merely to a violent extension of the marital rights over a class in one tribe to captured members of the corresponding class in another tribe." Furthermore, if the native songs prove the existence of wife-stealing, they also bear witness

[1] For additional examples of the coexistence of real or pretended capture with purchase or its allied forms, see especially KOHLER, "Studien," *ZVR.*, V, 334-68; *idem*, "Indische Gewohnheitsrechte," *ibid.*, VIII, 264 (Orissa); *idem*, "Ueber das Recht der Papuas," *ibid.*, VII, 378, 379 (actual purchase and capture *de facto*); also POST, *Familienrecht*, 138 ff., 142 ff., 147 ff.; WESTERMARCK, *op. cit.*, 383, 384, 386-88, 399, 401; MCLENNAN, *Studies*, I, 38, 39; LETOURNEAU, *op. cit.*, 120, 126, 144.

[2] WESTERMARCK, *op. cit.*, 383.

[3] FISON AND HOWITT, *Kamilaroi and Kurnai*, 276, 285, 343 ff., 347, 348, 352-56; KOHLER, "Das Recht der Australneger," *ZVR.*, VII, 351, 352; CURR, *The Australian Race*, I, 107; POST, *Familienrecht*, 205, 206; WESTERMARCK, *op. cit.*, 390; MCLENNAN, *op. cit.*, I, 40. By the *Tualcha mura* custom, above referred to, a daughter is promised *before* she is born: SPENCER AND GILLEN, *Native Tribes of Cent. Australia*, 554-60.

in the most decisive manner to love and choice in Australian marriage.[1]

Very often capture and purchase are found united in such a way that they seem almost to be contending with each other for the mastery.[2] This union occurs in two general forms: either the woman elopes or is carried off without the guardian's consent, and a reconciliation is subsequently effected through payment of the bride-price or the rendering of a composition; or else the stipulation of the price is made before the abduction. In the latter case it is plain that we are dealing merely with ceremonial capture; in the former case the significant fact is that we have to do with a breach of the law.[3] A price is paid for the stolen woman because, like other property, she has an economic value; or a penalty is rendered in order to escape the blood-feud. Frequently, however, even when abduction occurs without the consent or knowledge of the girl's friends, the subsequent procedure in arranging the price or the penalty is strictly regulated by custom; and this fact may perhaps be

[1] MCLENNAN, *op. cit.*, I, 41, 42, as evidence of wife-capture, gives the following stanzas, taken from GREY'S *Travels*, II, 313:

"Wherefore came you, Weerang,
In my beauty's pride,
Stealing cautiously,
Like the tawny boreang,
On an unwilling bride?
'Twas thus you stole me
From one who loved me tenderly.
A better man he was than thee,
Who having forced me thus to wed,
Now so oft deserts my bed.
Yang, yang, yang, yoh.

"Oh, where is he who won
My youthful heart;
Who oft used to bless
And called me loved one?
You, Wearang, tore apart
From his fond caress
Her whom you desert and shun;
Out upon the faithless one!
Oh, may the Boyl-yas bite and tear
Her, whom you take your bed to share.
Yang, yang, yang, yoh."

[2] DARGUN, *Mutterrecht und Raubehe*, 85–87, thinks we have in these forms a transition from actual to formal wife-capture. Possibly they may represent in particular instances transition from capture to purchase. *Cf.* POST, *Familienrecht*, 142 ff., 147 ff. for numerous examples; and KOHLER, "Studien," *ZVR.*, V, 337 ff.

[3] Compare BERNHÖFT, "Principien des eur. Familienrechts," *ZVR.*, IX, 394, 395, who believes that in Europe rape was never a "legal form" of marriage. It was merely a "preliminary act." Among primitive men no difference is made between fact and law; and only in this sense can wife-capture be regarded as the foundation of a marriage; *ibid.*, 392, 393.

regarded as a further proof that the forms under consideration, in special instances, represent a transition from capture to contract. Among the Galela and Tobelorese,[1] for example, when a man wishes a woman of a hostile tribe or family, he causes her to be abducted, as she goes out for water or wood, by twenty or more of his female friends, who bind her, if she resists, and bear her away to his house. Should the relatives of the girl attempt a rescue by force, the villagers assemble and try to effect a reconciliation. Pending the stipulation of the bride-money, the girl is allowed to escape to her home, where she is carefully watched. On the third day the friends assemble to discuss the price. If the woman has not lived with the man, she may then refuse him; otherwise the payment of the price is finally arranged.[2] In case of elopement it is the custom among the same people for the lovers to fly to the forest or to take refuge in a "prahu" on the sea, where they remain a month. On their return they are received in the house of the girl's parents. If the lover pays the bride-money, the woman follows him to his house; otherwise he must remain with his wife, and the children legally belong to the mother.[3] With the Bataks of Sumatra good form requires that the bridegroom should leave behind a weapon, a piece of clothing, or some similar article as a token that he has abducted the bride. Thereupon, when the bride-money is paid the marriage is regarded as legally complete. Should no token be left, however, the rape is illegal and the culprit may receive punishment.[4]

Very naturally elopement or abduction most frequently takes place when it is difficult or impossible to bring about the marriage in the legal or customary way. Either the

[1] Inhabitants of the Malay island of Djilolo. *Cf.* RIEDESEL, "Galela und Tobeloresen," *ZFE.*, XVII (1885).

[2] POST, *op. cit.*, 148. [3] *Ibid.*, 151, 152.

[4] *Ibid.*, 148, 149. For other examples of leaving a token see *ibid.*, 149, 150.

parties belong to groups between which *jus connubii* does not exist; or the lover is too poor to pay the price demanded for the bride; or else the parents refuse their consent. Here we have an example of the operation of simple motives with which society, at all times and in all places, has been familiar. Such marriages, it has been pointed out, are usually marriages of inclination at least on the side of the lover, as opposed to the conventional marriage by purchase.[1]

It appears, then, so far as present investigation enables us to determine, that there is not sufficient evidence for assuming that wife-capture, except in isolated cases, has generally grown into marriage by purchase. As a rule, even among the lowest races, foreign or warlike capture is an exceptional method of procuring wives; while bride-stealing at home, though the symbol may sometimes be sanctioned, is merely looked upon as illegal or even immoral;[2] and, therefore, with advancing civilization it yields to contract as the highest means of effecting a marriage.[3]

Having now considered its relation to capture, let us next notice the significance of wife-purchase as a social institution.

The custom of giving a compensation for a bride, though not universal, exists or has existed among a vast number of peoples in various stages of progress; and it often survives

[1] *Ibid.*, 138, 154 ff. An excellent illustration is afforded by Kalmuck custom: KOEHNE, "Das Recht der Kalmücken," *ZVR.*, IX, 462.

[2] Among the Nez-Percés Indians, for example, runaway matches are not unknown, but "the woman is in such cases considered a prostitute, and the bride's parents may seize upon the man's property."—BANCROFT, *Native Races*, I, 277.

[3] The view presented in the text should be compared with BERNHÖFT's judgment. Granting that capture was crowded out by purchase, he does not think, with DARGUN, that it was effected through abduction by prior or subsequent payment of the composition or price; but rather that it gradually disappeared in consequence of the severe penalties imposed for breach of the law and other disadvantages; so that "in Folge dessen der schon früher durchaus übliche Kauf zur alleinigen Eheschliessungsform wurde."—"Principien des eur. Familienrechts," *ZVR.*, IX, 401. *Cf.* the theory of HILDEBRAND, *Ueber das Problem*, 17-22, who thinks rape follows purchase, at least in the form of gifts, but that it is of comparatively little importance; and MUCKE, *Horde und Familie*, 111 ff., 139 ff., who reaches the same result in a different way. See also DARGUN, *Mutterrecht und Vaterrecht*. 120-22, 127, where the "illegal" nature of capture is admitted.

as a mere symbol in the marriage ceremony. Kulischer, indeed, declares that actual wife-purchase can now be discovered only among a few savage races.[1] But this assertion seems to be wholly inconsistent with the facts. Recent researches, notably those of Post, Kohler, Westermarck, and various American scholars, place it beyond question that taking a wife, as the prosaic result of an ordinary bargain, is a familiar institution in many parts of the world.[2] Husband-purchase also appears, but examples of it are exceedingly rare.[3] Several methods of buying a wife are in use. The simplest way, says Westermarck, is "to give a kinswoman in exchange for her." This method is found in Sumatra;[4] and the Australian male "almost invariably obtains his wife or wives, either as the survivor of a married

[1] KULISCHER, "Intercommunale Ehe durch Raub und Kauf," *ZFE.*, X, 219; *cf.* WESTERMARCK, *op. cit.*, 390.

[2] In general on wife-purchase and its survivals see POST, *Familienrecht*, 173-220; *idem*, *Geschlechtsgenossenschaft*, 63-88; *idem*, *Afrikanische Jurisprudenz*, I, 329 ff.; WESTERMARCK, *Human Marriage*, 390-416; STARCKE, *Primitive Family*, 146, 232, 39, *passim*; LETOURNEAU, *L'évolution du mariage*, 130-50; SPENCER, *Principles of Sociology*, I, 655, 754, 755; HELLWALD, *Die mensch. Familie*, 306 ff., 323 ff.; GROSSE, *Die Formen der Familie*, 111 ff., 169 ff.; HILDEBRAND, *Recht und Sitte*, 19 ff., 31 ff.; BANCROFT, *Native Races*, as below cited; FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 213, 218, 245, 246; *idem*, "Ehe und Eherecht der griechischen Heroenzeit," *ibid.*, XI, 327 ff.; BERNHÖFT, "Principien des eur. Familienrechts," *ibid.*, IX, 400; KOHLER, "Studien," *ibid.*, V, 334-68; *idem*, "Indisches Ehe- und Familienrecht," *ibid.*, III, 345 ff.; *idem*, "Die Ehe mit und ohne Mundium," *ibid.*, VI, 333 ff.; and his other monographs, *ibid.*, VI, 167 (Burma), 365 and 405 (China); VII, 351 ff. (Australia), 371, 372, 378 (Papuas), 382 (India), 395 (Armenia); VIII, 85 (Gypsies), 86 (Eskimos), 87, 113 (Dekkan), 266 (Orissa), 241 ff. (Islam); IX, 326, 327 (Bengal), 334 (Chittagong), 334 (Burma); XI, 57 (Azteks), 167 (India), 419-21, 432 ff. (Kamerun); REHME, "Das Recht der Amaxosa," *ZVR.*, X, 37, 38; POST, "Kodifikation des Rechts der Amaxosa," *ibid.*, XI, 232 ff.; HENRICI, "Das Recht der Epheneger," *ibid.*, XI, 134; KOEHNE, "Das Recht der Kalmücken," *ibid.*, IX, 461 ff.; LIPPERT, *Geschichte der Familie*, 42 ff., 95-118; UNGER, *Die Ehe*, 11, 17, 33, 46, 47, 77; LEIST, *Alt-arisches Jus Gentium*, 115, 116, 122 ff.; KRAUSS, *Sitte und Brauch der Südslaven*, 272 ff., 451; JOLLY, *Ueber die rechtl. Stellung der Frauen*, 16 ff.; KAUTSKY, *Kosmos*, XII, 329 ff.; DARGUN, *Mutterrecht und Vaterrecht*, 122-28, 149-54; HEUSLER, *Institutionen*, II, 277-86; TILLINGHAST, "The Negro in Africa and America," *Pub. Am. Ec. Ass.* (New York, 1902), III, chap. v; ELLIS, *Ewe-Speaking Peoples*, 153 ff., 199 ff.

[3] This occurs, occasionally, where it is the custom for the husband to pass into the wife's family at marriage: POST, *Familienrecht*, 174; *cf.* SPENCER, *Principles of Sociology*, I, 788; WESTERMARCK, *Human Marriage*, 382, 416.

[4] WESTERMARCK, *op. cit.*, 390; MARSDEN, *History of Sumatra*, 259.

brother, or in exchange for his sisters, or later on in life for his daughters."[1] Much more general is the custom, sometimes distinguished with the name of "marriage by service," in which the bridegroom earns his bride by serving her father. "This practice, with which Hebrew tradition[2] has familiarized us, is widely diffused among the uncivilized races of America, Africa, Asia, and the Indian Archipelago."[3] In America, as elsewhere, the custom takes a variety of forms. Among the Mayas the young husband is required to build a house opposite the home of his bride and live in it five or six years while he works for her father. If the service is not faithfully performed, he is dismissed, and the father-in-law gives his daughter to another.[4] In Yucatan the term of service is three or four years; and so stringent is the requirement that it is regarded as highly unseemly to shirk the duty.[5] According to Martius, with whom Souza mainly agrees,[6] the Brazilian native usually gains his first wife by serving her father. For him he goes hunting and fishing. He helps him build his hut, clear the forest, bring wood, and make canoes, weapons, and nets. During this period the lover continues to dwell with his own relatives, but tarries the whole day at the house of his wished-for

[1] WESTERMARCK, *op. cit.*, 390. Compare CURR, *The Australian Race*, I, 107; FISON AND HOWITT, *Kamilaroi and Kurnai*, 276, 285, 343. On exchange see KOHLER, in *ZVR.*, III, 345 (India); VIII, 242 (Islam), 112 (India).

[2] LICHTSCHEIN, *Die Ehe nach mosaisch-talmud. Auffassung*, 10, 11.

[3] WESTERMARCK, *op. cit.*, 390, 391. He enumerates the tribes in each continent among whom the custom is found. The subject is also discussed by POST, *Familienrecht*, 197, 217-20; *idem*, *Geschlechtsgenossenschaft*, 75; LETOURNEAU, *op. cit.*, 135-37; BERNHÖFT, "Ehe und Eherecht der griech. Heroenzeit," *ZVR.*, XI, 321 ff. For examples see KOHLER, in *ZVR.*, V, 356, 357 (Malay tribes); VI, 333, 334, 336 n. 49, 167; VIII, 113; IX, 334; XI, 420.

[4] BANCROFT, *Native Races*, I, 662.

[5] LETOURNEAU, *op. cit.*, 136.

[6] The "youths serve the parents of the dames two or three years before they are given them for wives; and they do not give them except to those who serve them best, the men in love doing the planting, fishing, and hunting for their fathers-in-law who wish them to, and fetch them firewood from the forest; and when the fathers-in-law give over to them the dames, they go and lodge with the fathers-in-law with their wives," leaving their own kindred: SOUZA, *Tratado Descriptivo do Brazil* (1570-87): *Revist. Inst. Hist.*, XIV, 311 ff.; *cf.* also KOHLER, in *ZVR.*, V, 352.

bride.[1] If his suit is successful, either he may take up his abode for a while with his wife's family, or he may at once set up a separate hut for himself. Among the Guaycurûs the son-in-law dwells permanently with the woman's parents, but from the moment of the marriage they avoid speaking with him; and this custom of "bashfulness," often regarded as a survival of wife-capture and so indirectly of mother-right, prevails very widely in America and in other lands.[2] Service, though merely as proof of manly worth, appears also among the Seri, "probably the most primitive tribe in North America." The "would-be groom is required to enter the family of the girl and demonstrate (1) his capacity as a provider and (2) his strength of character as a man, by a year's probation."[3] Among the Kenai of the far north the lover must perform a year's service for his bride. "The wooing is in this wise: early some morning he enters the abode of the fair one's father, and without speaking a word proceeds to bring water, prepare food, and to heat the

[1] During this courting season, among the small tribes on the Amazon, the lover enjoys the so-called "bosom-right;" and this custom, which appears to be identical in character with that of "bundling" and the "proof-night," appears elsewhere in America and in other parts of the world: MARTIUS, *Rechtszustande*, 56; *ibid.*, *Ethnographie*, I, 108; *cf.* HELLWALD, *Die mensch. Familie*, 321, 322.

[2] Among the Siouan peoples "the mother-in-law never speaks to her son-in-law, unless on his return from war he bring her the scalp and gun of a slain foe, in which event she is at liberty from that moment to converse with him."— DORSEY, "Siouan Sociology," *XV. Rep. of Bureau of Eth.*, 241, 242. Read especially DORSEY's very interesting account of this custom in his "Omaha Sociology," *ibid.*, III, 262, 263; and compare BECKWITH, "Customs of the Dakotahs," *Rep. Smith. Inst.*, 1886, Part I, 256, 257; and LONG, *Expedition*, I, 253, 254.

It exists likewise in Australia: MATHEW, "Aust. Aborigines," *Jour. R. S. N. S. Wales*, 408, 409; DAWSON, *Aust. Aborigines*, 29; among the Kafirs and Bushmans: FRITSCH, *Die Eingeborenen Süd-Afrikas*, 114, 445; in China: SMITH, *Village Life in China*, chap. xxiii; in general, HELLWALD, *Die mensch. Familie*, 289, 290; LIPPERT, *Kulturgeschichte*, II, 93; and CRAWLEY, *Mystic Rose*, 391–414, *passim*.

[3] MCGEE, "Siouan Indians," *XV. Rep. of Bureau of Eth.*, 202; and especially his "Seri Indians," *ibid.*, XVII, Part I, 279–87; *cf.* RATZEL, *Hist. of Mankind*, II, 125, who says the marriage ceremonies often mean ability to support a family. The Point Barrow Eskimo takes his wife for "reasons of interest." He wants her for household duties; and conversely she desires a good hunter. The mother usually chooses for her son the prospective bride, who is expected to serve a probation as "kivgak" (servant) in the future mother-in-law's kitchen; but sometimes the man goes to the woman's house to become a member: MURDOCH, *IX. Rep. of Bureau of Eth.*, 401.

bath-room." When asked why he performs these services, "he answers that he desires the daughter for a wife. At the expiration of a year, without further ceremony, he takes her home, with a gift; but if she is not well treated by her husband, she may return to her father, and take with her the dowry."[1] In some places the service must all be rendered in advance; in others, the girl is received on credit and the man serves the required term after the marriage—a familiar example of each of these methods being afforded by the case of Jacob and Laban's daughters.[2] Moreover, as already seen, sometimes it is only the first or chief wife who is earned by service, the later ones being bought in exchange for property in the more usual way.

According to Spencer, the "obtaining of wives by services rendered, instead of by property paid," is a "cause of improvement in the treatment of women," and constitutes therefore a "higher form of marriage," developing "along with the industrial type" of society. "Obviously, a wife long labored for is likely to be more valued than one stolen or bought;" and the long association of the lovers during the time of service is likely to foster more refined sentiments than the "merely instinctive;" to imitate "something approaching to the courtship and engagement of civilized peoples."[3] But, on the other hand, without denying that these results may follow, Westermarck forcibly objects that "industrial work promotes accumulation of property, and consequently makes it easier for the man to acquire his wife

[1] BANCROFT, *Native Races*, I, 134.

[2] So in New Guinea: KOHLER, in *ZVR.*, VII, 371. In some cases the "man goes over to the woman's family or tribe to live there forever; but Dr. Starcke suggests that this custom has a different origin from the other, being an expression of the strong clan sentiment, and not a question of gain."—WESTERMARCK, *Human Marriage*, 391; STARCKE, *Primitive Family*, 39. For McLennan's view of so-called "Beena" marriage, see above, p. 16.

[3] SPENCER, *Principles of Sociology*, I, 754, 755. On the modification of the servitude of the wife through the service-contract see LETOURNEAU, *L'évolution du mariage*, 137; BANCROFT, *Native Races*, I, 134 (Kenai).

by real purchase." Serving for wives is prevalent among such rude races as the Bushmans and Fuegians. Hence it seems "almost probable that marriage by services is a more archaic form than marriage by purchase; but generally they occur simultaneously." [1]

By far the most common way of purchasing a wife is by giving property in exchange.[2] Usually the amount of the price is arranged, like any other bargain, by agreement between the interested parties; but sometimes it is established by custom.[3] Always where the contract is merely a commercial transaction the price is in theory an equivalent for the economic loss sustained by the family or *gens* of the bride.[4] But the amount varies in every possible way. Often it depends upon the rank or beauty of the woman; or it may be determined by her strength and capacity for bearing children. It varies also with the economic condition of the times, the wife-market depending largely upon the law of supply and demand. In hard times, or where there is an excess of women, wives are cheap; when times are good or women scarce, the price rises in proportion. Among peoples somewhat advanced in culture sentiment must, of course, be taken into account. Where it is regarded as a disgrace to accept a small compensation for a daughter, high prices may lead to celibacy. Such, at the beginning of the past century, was the case in Servia, where the bridegroom, in addition to the purchase price, was expected to bestow liberal presents, not only upon the bride and her mother, but also upon all her near relatives. The presents were so expensive that many a "poor fellow was unable to marry at all;" and so

[1] WESTERMARCK, *op. cit.*, 391, 392.

[2] On the bride-price in various countries see POST, *Familienrecht*, 181–201; WESTERMARCK, *op. cit.*, 392–94; KRAUSS, *Sitte und Brauch der Südslaven*, 273 ff.; KOHLER, "Studien," *ZVR.*, V, 338 ff.; WAKE, *Marriage and Kinship*, 191, 199 ff., 239 ff., 215, 218, 235; BUCH, *Die Wotjäken*, 49 ff.

[3] POST, *op. cit.*, 181, 183.

[4] *Ibid.*, 181.

Black George in 1849 had a sumptuary law enacted restricting the price of a girl to one ducat, and this must be paid before the wedding.[1] But the bride-price "varies most according to the circumstances of the parties, and according to the value set on female labour."[2]

Custom differs as to the time of payment. Sometimes the full price must be given before the nuptials; often the bride is received on credit, and the price subsequently paid in instalments. In case of credit the wife with the children usually remains with her father, and the husband does not gain absolute ownership or control until the debt is paid in full.[3]

Among the aborigines of America, North and South, actual wife-purchase, both by service and by property rendered, is exceedingly common; though in some tribes, as in other parts of the world, the transaction takes the form of a simple exchange of gifts or of a bestowal of presents upon the bride's parents. The price is usually paid in horses, but many other forms of property are employed. Among the Kwakiutl, says Boaz, marriage "must be considered a purchase, which is conducted on the same principles as the purchase of a copper. But the object bought is not only the woman, but also the right of membership in her clan for the future children of the couple."

[1] KRAUSS, *Sitte und Brauch der Südslaven*, 275 ff. But see especially TURNER, *Slavisches Familienrecht*, 22, 24, who declares that the law of Black George was purely sumptuary, not dealing at all with the price of the bride, but with mere presents from the man's friends. The mistake, he says, originates in a wrong translation by Talvy, *Serbische Volkslieder*, II, Einleit., 2. Turner in general denies the former existence of wife-purchase among the Slavs, rejecting SCHLÖZER'S translation of *Nestor*, I, chap. 12, 124 ff., which passage is an important source usually cited in favor of former purchase. KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, 26 ff., however, follows the usual interpretation of Nestor and the law of Black George, giving examples of alleged wife-purchase and its survivals. *Cf.* POST, *op. cit.*, 182, 183; and WESTERMARCK'S chapter on "Marriage and Celibacy," especially, 145.

[2] WESTERMARCK, *op. cit.*, 392; POST, *op. cit.*, 180 ff., 188.

[3] *Ibid.*, 193-99; KOHLER, "Studien," *ZVR.*, V, 338, 350, 351; WESTERMARCK, *op. cit.*, 394; KOHLER, in *ZVR.*, VII, 371.

For "many privileges of the clan descend only through marriage upon the son-in-law of the possessor, who, however, does not use them himself, but acquires them for the use of his successor. These privileges are, of course, not given as a present to the son-in-law, but he becomes entitled to them by paying a certain amount of property for his wife. The wife is given to him as a first instalment of the return payment. The crest of the clan, its privileges, and a considerable amount of other property besides, are given later on, when the couple have children, and the rate of interest is the higher the greater the number of children. For one child 200 per cent. of interest is paid; for two or more children 300 per cent. After this payment the marriage is annulled, because the wife's father has redeemed his daughter. If she continues to stay with her husband, she does so of her own free will. . . . . In order to avoid this state of affairs, the husband often makes a new payment to his father-in-law" so that he "may have a claim to his wife."[1]

According to Dakota usage, either "bundles" of presents are exchanged by the interested families, or else the young man who wooes the maiden ties "a horse at her parents' door." On returning, if he finds the horse still there, he adds "another, keeping this up until" his "limit is reached." If the horses are taken away, he then enters "the lodge and takes his bride home." In case too high a price is demanded the lover tries elsewhere with his horses, unless, indeed, he entices the girl to elope with him; for "this is also recognized as a marriage."[2] In "choosing a helpmate or helpmates for his bed and board, the inland native" of the

[1] BOAZ, "Kwakiutl Indians," *Rep. Smith. Inst.*, 1895, *Nat. Mus.*, 358, 359.

[2] BECKWITH, "Customs of the Dakotahs," *Rep. Smith. Inst.*, 1886, Part I, 255-57. Compare RIGGS, "Dakota Grammar," *Cont. to N. A. Eth.*, IX, 205, 206. "Dowries" are exchanged among the Coast Indians: NIBLACK, *Rep. Smith. Inst.*, 1888, *Nat. Mus.*, 367, 368. Bundles of presents are used by the Abipones: KLEMM, *Kulturgeschichte*, II, 75, 76.

Columbian region "makes capacity for work the standard of female excellence, and having made an election buys a wife from her parents by the payment of an amount of property, generally horses, which among the southern nations must be equaled by the girl's parents. . . . . To give away a wife without a price is in the highest degree disgraceful to her family."[1] Among the Indians of northern California likewise "marriage is sometimes essentially a matter of business. The young brave must not hope to win his bride by feats of arms or softer wooing, but must buy her of her father, like any other chattel, and pay the price at once, or resign in favor of a richer man. The inclinations of the girl are in nowise consulted; no matter where her affections are placed, she goes to the highest bidder." The social position of the bride depends upon the price she brings; and, as a natural result of the system, the "rich old men almost absorb the female youth and beauty of the tribe, while the younger and poorer men must content themselves with old and ugly wives. Hence their eagerness for that wealth which will enable them to throw away their old wives and buy new ones."[2] Among the California Karok, according to Powers, "a wife is seldom purchased for less than half a string" of dentalium shell, but "when she belongs to an aristocratic family, is pretty, and skilful in making acorn-bread and weaving baskets, she sometimes costs as high as two strings."[3] According to the same authority, among the Shastika in California a girl is bought "of her father for shell-money or horses, ten or twelve cayuse ponies being

[1] BANCROFT, *op. cit.*, I, 276, 277. According to WAKE, *Marriage and Kinship*, 183, the Indians of northern California are "so essentially wife purchasers that the children of a wife who has cost her husband nothing are looked upon as bastards and treated with contempt."

[2] BANCROFT, *op. cit.*, I, 349, 350. The old men have a similar monopoly among the Zulus: KOHLER, in *ZVR.*, V, 350.

[3] POWERS, *Tribes of California*, 22. A string of dentalium is worth $40 or $50, *ibid.*, 21.

paid for a maid of great attractions;"[1] and the Navajo bridegroom of New Mexico will pay so exhorbitant a price as twelve horses only for a bride "possessing unusual qualifications, such as beauty, industry and skill" in her necessary employments.[2]

Marriage by purchase appears also among various African peoples.[3] The bride-price is usually rendered in cattle or goats, the amount varying greatly even in the same tribe. From two to thirty cows will buy a wife among the Kafirs. But, as sometimes happens, if a youth through his friends reveals to the father a liking for his daughter, he must in consequence pay more oxen for his bride.[4] By the Zulu a newly bought wife is regarded as an investment of capital from which is expected a return of interest through her labor and the children which she bears. Should he be disappointed in his bargain, the woman becoming sick, weak, or remaining childless, he sends her back to her father and

[1] *Ibid.*, 247.

[2] WESTERMARCK, *op. cit.*, 292, 293: SCHOOLCRAFT, *Indian Tribes*, IV, 214; LETHERMAN, "Sketch of the Navajo Tribe of Indians," *Rep. Smith. Inst.*, 1855, 294.

On wife-purchase, exchange of presents, and wedding ceremonial among American aborigines see further MARTIUS, *Rechtszustande*, 57, 58; *idem*, *Ethnographie*, I, 108–10; EELLS, "Indians of Wash. Ter.," *Rep. Smith. Inst.*, 1887, 665 (price of woman $100 to $400); MCGEE, "Siouan Indians," *XV. Rep. of Bureau of Eth.*, 178; DORSEY, "Siouan Sociology," *ibid.*, XV, 242; TURNER, "Ethnology of the Ungava District," *ibid.*, XI, 188; MACCAULEY, "Seminole Indians of Florida," *ibid.*, V, 495, 496 (ceremonies); KOHLER, "Studien," *ZVR.*, V, 342, 352 ff.; POST, *Familienrecht*, 183; SCHOOLCRAFT, *Indian Tribes*, II, 48.

[3] LETOURNEAU, *L'évolution du mariage*, 137 ff.; KOHLER, in *ZVR.*, V, 350 ff.; *idem*, "Das Negerrecht," *ibid.*, XI, 419 ff., 433, 434, 435–41; REHME, "Das Recht der Amaxosa," *ibid.*, X, 37, 38; HENRICI, "Das Recht der Epheneger, *ibid.*, XI, 134; POST, *ibid.*, XI, 232 (Amaxosa); *idem*, *Familienrecht*, 183, 184; BUCHNER, *Kamerun*, 31 ff.; especially FRITSCH, *Die Eingeborenen Süd-Afrikas*, 112 ff. (Kafirs), 141-44 (Zulus), 192–94 (Bechuanas), 365 (Namaquas), 444, 445 (Bushmans); and MUNZINGER, *Ostafrikanische Studien*, 146 ff., 240, 241, 319 ff., 387; ELLIS, *Ewe-Speaking Peoples*, 153 ff., 199 ff.

[4] WESTERMARCK, *op. cit.*, 393. Compare FRITSCH, *op. cit.*, 112, 113, who says the "price varies from some six or seven oxen to thirty or more, if the daughter of a respectable chief is concerned." The price is usually paid in instalments; and, according to Fritsch, among the Kafirs the only thing which distinguishes a woman from cattle is the fact that her lord and master may not wantonly kill her or do her severe bodily hurt; for then the chief would demand the composition or blood-money.

demands a return of the cattle.[1] The Damara are so poor "that they are often glad to take one cow for a daughter." The rate is much higher among the Banyai. "In Uganda, the ordinary price of a wife is either three or four bullocks, six sewing needles, or a small box of percussion caps, but Mr. Wilson was often offered one in exchange for a coat or a pair of shoes."[2] Very commonly in Africa wives are pawned or even mortgaged, and they are devolved upon the husband's heirs as a part of the inheritance.[3]

Throughout the rude tribes of Asia and northern Europe, more especially among those of the Turco-Tartaric race, wife-purchase exists in its crudest form.[4] The *kalym*, or bride-price, is usually rendered in horses or cattle. The young Kirgese, for instance, has to pay from three hundred to one thousand head of cattle or one hundred mares for a wife, five mares being reckoned as the equivalent of a camel.[5] Ordinarily a widow depreciates in market value as compared with a maiden;[6] but the Turcoman is more practical, knowing the advantage of experienced service. Though generally

[1] In such case the father may return the woman to the husband with a part of the cattle; and thus the higgling will proceed till an agreement is reached: FRITSCH, *op. cit.*, 143, 144; *cf.* RATZEL, *Hist. of Mankind*, II, 434 (Zulus), 370 (Bechuanas).

[2] WESTERMARCK, *op. cit.*, 393; RATZEL, *op. cit.*, III, 16; WILSON AND FELKIN, *Uganda and the Egyptian Soudan*, I, 187. Purchase or exchange of gifts exists widely among the peoples on the northern borders of Abyssinia: MUNZINGER, *Ostaf. Studien*, 146 ff., 240, 241, 319 ff., 387. *Cf.* also POST, *op. cit.*, 183, 184; LETOURNEAU, *op. cit.*, 137 ff.; WAKE, *op. cit.*, 213-15; WAITZ, *Anthropologie*, II, 108-17 (many examples).

[3] WAITZ, *op. cit.*, II, 118, 119; KOHLER, "Das Negerrecht," *ZVR.*, XI, 422-24. In case of the death of a husband who has made part payment for his wife, the son or other heir pays the balance due and takes the woman: *ibid.*, 423, 424. For cases of wife-pawning among the Siamese see BASTIAN, *Rechtsverhältnisse*, 407 ff.

[4] See particularly KOHLER, in *ZVR.*, V, 334 ff., who gives much interesting matter relating to these peoples; also POST, *op. cit.*, 184 ff.; LETOURNEAU, *op. cit.*, 143 ff.; WESTERMARCK, *op. cit.*, 393, 395; SCHROEDER, *Hochzeitsbräuche, passim;* BUCH, *Die Wotjäken, loc. cit.*

[5] POST, *op. cit.*, 185, 186. Among the Kirgese of Semipalatinsk cattle are the unit of exchange in which other property is reckoned: *ibid.*, 186. Post gives many interesting details as to prices of women among the Asiatic and European peoples.

[6] POST, *ibid.*, 190 ff., gives examples. "Bei den Osseten im Kaukasus zahlt man für Wittwen die Hälfte des Brautpreises der Jungfrau, bei den Arabern am Sinai die Hälfte oder ein Drittel."—*Ibid.*, 191. *Cf.* also WESTERMARCK, *op. cit.*, 392.

a young girl may be had for five camels, he is quite willing to give fifty or even a hundred for a well-preserved widow.[1] The Tartar maiden of northern Asia is sold by her parents for such goods as pass current in exchange. She brings usually a variable number of sheep, horses, or cattle; but the price is also rendered in other commodities, such as brandy, beer, or linen. The contract is arranged with the utmost exactness between the parents. The future husband and wife are not even informed. In theory, at least, "their sentiments, their desires and antipathies, are not taken into consideration." When all is carefully specified, the contract of sale is legally completed before witnesses; but the bride is not delivered to the bridegroom until after the ceremony of marriage, which takes the form of symbolical capture.[2] In China the harsher features of this custom are somewhat softened. A "present is given by the father of the suitor, the amount of which is not left to the good will of the parties . . . . but is exactly stipulated for by the negotiators of the marriage," the transaction thus differing but little in form from an ordinary bargain, although it must not always be regarded as an actual contract of sale, but rather as a means of providing the wife's dower.[3]

In all branches of the Semitic race marriage, at some time, has been a matter of simple sale and purchase. The married woman, in early Arabia, was looked upon as merely

[1] LETOURNEAU, *L'évolution du mariage*, 144. Women who have shown themselves fruitful sometimes bring more than girls: POST, *op. cit.*, 190, 191; *Die Anfänge des Staats- und Rechtsleben*, 41 ff.; *Afrikanische Jurisprudenz*, I, 340, 341.

[2] LETOURNEAU, *op. cit.*, 143, 144. *Cf.* KOEHNE, "Das Recht der Kalmücken," *ZVR.*, IX, 461 ff., who shows that the Kalmuck wife is in a relatively worthy position.

[3] WESTERMARCK, *op. cit.*, 394, 395; JAMIESON, *China Review*, X, 78. But compare MÖLLENDORFF, *Das chinesische Familienrecht*, 21, 23, *passim;* and SMITH, *Village Life in China*, chap. xxiii. According to HUC, *Chinese Empire*, II, 225 ff., the price is paid in two instalments, one part at the signing of the contract, another a few days before the wedding. Gifts are also made by the bridegroom's parents; while the bride's parents provide her with a trousseau. *Cf.* KOHLER, "Aus dem chinesischen Civilrecht," *ZVR.*, VI, 365 ff., 405, 406; LETOURNEAU, *op. cit.*, 144, 145; RATZEL, *Hist. of Mankind*, III, 493-508; KLEMM, *Kulturgeschichte*, VI, 102-24.

a bond servant. "I charge you with your women," says the prophet, "for they are with you as captives." Accordingly, Robertson Smith informs us, in Arabic lexicons *áwânî*, or "captives," is "actually used in the sense of married women generally."[1] The *mahr*, or bride-price, was paid to the woman's kindred. But under Islam it has become identical with the *sadâc*, or present to the bride, the two terms being synonymous.[2] The Arabic *mahr* is the same as the Syriac *mahrâ* and the Hebrew *móhar;* and in each case it is paid to the damsel's father.[3] In the early days of Israel, apparently, the amount of the bride-price established was fifty shekels of silver;[4] and Boaz actually declares that he has purchased Ruth the Moabitess to be his wife.[5] At this time, however, the context shows that marriage among the Jews was something more than a mere bargain, though there can be little doubt that actual wife-purchase originally existed. "At a later date, a girl was, until puberty, at the disposal of her father, who could either sell her or marry her to whom he pleased, being a Hebrew. There were, however, certain conditions, one of which was that the purchaser could not sell the girl to another person, and if he did not espouse her,

[1] SMITH, *Kinship and Marriage*, 77 ff. He quotes the following lines from the *Kâmil*, 270 ff.:

> "Never let sister praise brother of hers: never let daughter bewail
> a father's death;
> "For *they* have brought her where she is no longer a free woman,
> and *they* have banished her to the farthest ends of the earth."

[2] SMITH, *op. cit.*, 78, 79. *Cf.* on the Arabs, LETOURNEAU, *op. cit.*, 117; WESTERMARCK, *op. cit.*, 395; POST, *op. cit.*, 191–93, *passim;* especially KOHLER, "Studien," *ZVR.*, V, 357 ff., and the literature there cited; *idem*, "Ueber das vorislamitische Recht," *ibid.*, VIII, 241, 248, 259; and TORNAUW, "Das Erbrecht nach den Verordnungen des Islams," *ibid.*, V, 129–37; FRIEDRICHS, "Das Eherecht des Islam," *ibid.*, VII, 259–61, 243, 252, 272.

[3] SMITH, *op. cit.*, 79.

[4] Deut. 27:29; *cf.* LICHTSCHEIN, *Die Ehe nach mosaisch-talmudischer Auffassung*, 10.

[5] Ruth 4:10; Hosea 3:2. *Cf.* SMITH, *op. cit.*, 79; WESTERMARCK, *op. cit.*, 395; and in general on Hebrew matrimonial customs see BADER, *La femme biblique*, 1–225, 114, 115 (móhar).

or marry her to his son, he was bound, when she reached the age of puberty, or at the end of six years, to aid her in obtaining freedom by reclaiming from her father the price paid for her services."[1] "In the betrothal by *kasaph*, of the later Talmudic law, purchase appears as a mere survival. The man gives to his chosen bride, in the presence of two witnesses, a piece of money or some other gift of equal value, with the words: 'Be thou consecrated to me.' Even the *peruta* or smallest coin used in Palestine or some unimportant friendly service was legally sufficient;[2] and this sham purchase has been perpetuated in the modern Jewish ceremony of 'marrying by the penny.'"[3]

Traces of marriage by purchase, real and pretended, are also widely diffused throughout the nations of the Aryan stock. Among the Afghans the price of a bride is paid to the father, but he returns a part of it as a dower.[4] In upper Albania the price is equivalent to 600 marks; and there the symbols of rape appear in the marriage ceremony.[5] According to Leist and Zimmer, the Hindu maiden in Vedic times was sought of her father, not by the suitor himself, but by a friend called the bride-wooer;[6] but, as a legal form, the bride

[1] WAKE, *op. cit.*, 237; WEILL, *La femme juive* (1874), 11, 12, 117 ff.

[2] LICHTSCHEIN, *Die Ehe*, 11, 12; MIELZINER, *Jewish Law of Marriage and Divorce*, 77 ff. This author's surmise that the symbolical marriage with money was adopted under influence of the Roman *coemptio* is, of course, not well founded: *ibid.*, 78 n. 2.

[3] WESTERMARCK, *op. cit.*, 395. Even in the days of Abraham the purchase price is beginning to be transformed into a dower: "And the servant brought forth jewels of silver, and jewels of gold, and raiment and gave them to Rebekah; he gave also to her brother and to her mother precious things."—Gen. 24:53. *Cf.* WESTERMARCK, 408, and the authorities there cited.

[4] KOHLER, in *ZVR.*, V, 361. *Cf.* LETOURNEAU, *op. cit.*, 147, who says that so much do they regard wives as property that in case of remarriage the second husband has to indemnify the family of the first for the bride-price.

[5] KOHLER, *loc. cit.*, 361, 362. Even in recent times the chieftains in middle Albania were accustomed to steal their wives from Turkish families and to compel them to receive Christian baptism: *ibid.*, 362.

[6] The "bride-wooer" appears in many places: SCHROEDER, *Hochzeitsbräuche*, 32-45, 200 ff.; KOHLER, "Indische Gewohnheitsrechte," *ZVR.*, VIII, 90.

must be paid for by rich presents,[1] which were, however, returned to her as a dower.[2] Here we have to do with a survival; but originally actual wife-purchase, side by side with wife-capture, must have existed. One of the eight forms of marriage mentioned in the *Ordinances of Manu* as having been proper for the two lower castes, but here condemned as immoral,[3] is the *Âsura* rite. It is described as "the gift of a maiden voluntarily after presenting to the kinsmen and the maiden wealth as much as the suitor can."[4] Disapproval of real wife-purchase thus early produced two very important results: the institution of dower, already mentioned, and the *Ârsha* rite, or ceremonial purchase, still the most common form of marriage in India.[5] But the victory was by no means complete. "According to Dubois, to marry and to buy a wife are in India synonymous terms, as almost every parent makes his daughter an article of traffic."[6]

[1] ZIMMER, *Altindisches Leben*, 309–11, 314. LEIST, *Alt-arisches Jus Gentium*, 125–75, gives a masterly discussion of marriage among the early Aryans, with particular reference to the Hindus. With this should be compared the able paper of KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 342–442, who differs on some important points; and SCHRADER, *Sprachvergleichung und Urgeschichte*, 381 ff. The "rich presents" referred to consisted, in case of actual purchase, of one hundred cows; and LEIST, *op. cit.*, 128, notes the coincidence of this number with one hundred beeves mentioned by HOMER, *Iliad*, xi, l. 244.

[2] See *Apastamba*, II, 6, 13, 12.

[3] But Manu is not always consistent regarding the legality of the actual bride-money; see *Ordinances*, IX, 93: BURNELL AND HOPKINS, 260 n. 7; and *cf.* KOHLER, "Indisches Ehe- und Familienrecht," *ZVR.*, III, 345 n. 8.

[4] BURNELL AND HOPKINS, *Ordinances of Manu*, Lect. III, 20, 21, 24, 31, 41 ff., 47–50. "This form is also practiced at the present day by people claiming to be Brahmans, *e. g.*, the Caiva Brahmans, called 'Gurukkal,' in southern India, who seldom can get wives for less than a thousand rupees. It often happens that low-caste girls are palmed off on them."—*Ibid.*, 49 n. 2. *Cf.* JOLLY, *Hindu Law of Partition*, 73–76, for a discussion of the marriage forms; *idem*, *Ueber die rechtliche Stellung der Frauen*, 15–18.

[5] One of the eight marriage forms mentioned by Manu with approval: The "gift in due form of a maiden is called the *Arsha* rite, when a pair or two of cattle have been legally received from the bridegroom."—BURNELL AND HOPKINS, *op. cit.*, III, 29, 48, 49. *Cf.* JOLLY, *op. cit.*, 16; LEIST, *Alt-arisches Jus Gentium*, 130–33, for the consequences of disapproval of capture; and for the transformation of the purchase-price into the *Çulka* institution or dower, *ibid.*, 501 ff.

[6] WESTERMARCK, *op. cit.*, 396; DUBOIS, *A Description of the Character, Manners, and Customs of the People of India* (Madras, 1862), 102; *cf.* BURNELL AND HOPKINS, *op. cit.*, 49 n. 2.

The custom of rendering a compensation for a wife, Aristotle tells us, was prevalent in ancient Greece.[1] The bride-price consisted of "countless gifts;"[2] and in the Homeric age a maid was called "one who yields to her parents many oxen as presents from her suitor."[3] The Roman marriage by *coemptio* was a conveyance of the bride to the bridegroom through the mancipatory process in essentially the same way as a slave or an ox was sold. Gaius calls it an "imaginary sale;"[4] and it is usually regarded as a reminiscence of actual wife-purchase among the primitive Romans or their ancestors.[5] Moreover, in marriage by *usus* the husband gained full control of the wife by a year's prescription, exactly as in the case of any property.[6]

Herodotus mentions wife-purchase as a Thracian custom;[7] and until very recently it was also practiced by the Slavs.[8] The bazar of Babylon,[9] where, according to Herodotus,

[1] ARISTOTLE, *Politics*, II, viii. Compare HRUZA, *Ehebegründung*, 8 ff.

[2] *ἕδνα ἀπερείσια*: *Iliad*, xvi, l. 178; *Odyssey*, xix, l. 529. *Iliad*, xi, ll. 244 f., mentions one hundred oxen as the price. *Cf.* LEIST, *op. cit.*, 128; SCHRADER, *Sprachvergleichung und Urgeschichte*, 381, 382.

[3] "Alphesiboia": *Iliad*, xviii, l. 593; *cf.* WESTERMARCK, *op. cit.*, 396; and SCHRADER, *op. cit.*, 381.

[4] POSTE, *Gaius*, I, 113, 88, and the editor's notes, 89 ff.

[5] It is so regarded by SOHM, *Institutes of Roman Law*, 361 n. 3; by WESTERMARCK, *op. cit.*, 397; SCHRADER, *op. cit.*, 382. ROSSBACH, *Die römische Ehe*, 65 ff., 93, 145, 245 ff., holds that there was one original form from which both *coemptio* and *confarreatio* were derived, and that it combined purchase with religious elements. KARLOWA, *Die Formen der röm. Ehe*, 1 ff., 45., criticises Rossbach and holds that it remains to be proved that *coemptio* is a survival of real purchase, it being more likely a particular use of *mancipatio* arising perhaps under Servius Tullius; but LEIST, *op. cit.*, 128 ff., rejects this view and favors the theory of survival. LANGE, *Römische Alterthümer*, I, 105, 106; and BERNHÖFT, *Römische Königszeit*, 186, are in practical agreement with Karlowa. *Cf.* POSTE, *Gaius*, 89 ff.; MUIRHEAD, *Private Law of Rome*, 441–43, who rejects the theory of survival; LETOURNEAU, *L'évolution du mariage*, 149, 150; MONLEZUN, *Femme mariée*, 28–30.

[6] See LUBBOCK, *Origin of Civilization*, 74, who compares *usus* and *coemptio*. *Cf.* POSTE, *Gaius*, I, § 111, p. 88; LETOURNEAU, *op. cit.*, 150.

[7] HERODOTUS, v, 6: RAWLINSON, III, 180.

[8] KRAUSS, *Sitte und Brauch der Südslaven*, 272, 275; KOVALEVSKY, *Mod. Customs and Anc. Laws of Russia*, 26 ff. It existed among the Russians, Bohemians, and Pomeranians: WESTERMARCK, *op. cit.*, 397 n. 6, and the authorities there cited; but TURNER, *Slavisches Familienrecht*, 16 ff., 22, denies the former existence of purchase.

[9] HERODOTUS, i, 196: RAWLINSON, I, 262, 263.

girls were publicly sold in marriage, found its counterpart not long since in the maiden-market of the Roumanian Gainaberg.[1] The ancient laws of Ireland reveal it in curious relation to wife-capture. The legitimate wife is the wife who is bought. At the first marriage the full *coibche*, or bride-price, is paid to the father; at the second, the bride receives one-third; and at each succeeding marriage a gradually increasing portion falls to her share.[2] Marriage by abduction is illegal. In that case children begotten during the first month belong to the wife's family, though they may be conveyed to their father for a composition; and to such conveyance he is legally entitled, when the abduction takes place with the woman's consent. After the first month the relation between husband and wife is partially legalized. The children begotten thereafter belong to their father, though they are really illegitimate and hence not entitled to full rights of inheritance. Furthermore, a gift from the wife to the husband is void. But every defect in the marriage is at once cured by payment and acceptance of the *coibche*. In case the price cannot be arranged the family of the wife are entitled to damage. They may demand that another woman be placed at their disposal for an equal term; or they may exact a partnership share in the earnings of the abductor.[3]

[1] KOHLER, "Der Mädchenmarkt auf dem Gainaberg," *ZVR.*, VI, 398–400. The bride-price was represented by the presents tendered by the wooer. "Einst brachten die Eltern ihre heirathsfähigen Töchter (fetele) sammt der Mitgift auf den Berg, wo die Männer, die petitori, um sie warben; die Mädchen sassen dabei auf ihrer Mitgift oder standen hinter derselben. Der Kauflustige bot Geschenke und wurde mit den Eltern einig; der Frauenkauf war bereits ins donatorische Stadium getreten." Kohler finds, in certain customs connected with the market, relics of promiscuity and wife-capture.

[2] "Der Vater erhielt das volle Coibche bei der ersten Ehe der Tochter, bei der zweiten $\frac{2}{3}$, bei der dritten $\frac{1}{2}$, und so fort bis zu $\frac{1}{21}$; der Rest scheint der Tochter zugefallen zu sein; eine weitere verhältnissmässige Gabe, welche ebenfalls nach Anzahl der Ehen sich verkleinerte, kam dem Haupte der Familie zu."—KOHLER, in *ZVR.*, V, 363; O'CURRY, *Manners and Customs of the Ancient Irish;* SULLIVAN, *Int.*, I, clxxiii ff.; *Ancient Laws of Ireland*, III, 315.

[3] KOHLER, in *ZVR.*, V, 363, 364; *Ancient Laws of Ireland*, III, 401, 405, 541–45. In the early laws of Wales the *cowyll* corresponds to the Irish *coibche*, but it is already transformed into a dotal portion: KOHLER, *op. cit.*, 365, 366.

Finally, it may be noted, that traces of wife-purchase are found in every branch of the Germanic race. Nowhere, perhaps, can the evolution of the marriage contract in all its phases be studied with more satisfaction than in the history of our own ancestors. The subject will, therefore, be further considered in a later chapter.

III. The Antiquity of Self-Betrothal or Free Marriage

We have now traced in broad outline the extent of wife-purchase, and studied its general character and its principal forms. It appears essentially as a real contract of sale between third parties. Technically, at least, the bride and sometimes the bridegroom have nothing to do with the transaction. We have seen incidentally that the purchase-contract tends to become a ceremonial conveyance, and the bride-price to disappear in the dower. This transition is a fact of great social and legal import, and must therefore receive further attention. But, first, another question of interest arises: What is the place of wife-purchase in the evolution of human sexual relations? If it was not preceded by wife-capture as a general phase, is it the primitive method of contracting marriage? Or, to resolve the question into a more convenient form, what is the antiquity of mutual agreement as the basis of matrimonial union between a man and a woman?

On its face, marriage by purchase appears as an institution which could arise only after considerable sociological and mental progress had been made. It implies relatively advanced ideas of property and social organization. Precisely the same is true, in a less degree, of wife-stealing, particularly of the systematic capture of women. It implies for one thing an appreciation of the economic value of woman's services which is wholly inconsistent with most

primitive conditions. There are strong indications that in the beginning of distinctly human history marriage arose in the mutual consent of the parties. Nay, to discover the prototype of the primitive matrimonial contract it may be necessary to cross the boundary-line which separates man from the lower animals. This fact seems to have been too much neglected by writers on the history of marriage. Post, indeed, throws out a significant suggestion. Among very low races, he says, betrothal is a compact between the bride and the bridegroom. As soon, however, as the genealogical organization is further developed, marriage is changed from an individual relation to a relation between families, and the betrothal becomes a compact between the kindred groups. With the decay of the gentile constitution marriage and betrothal gradually become again an individual matter; so that in this regard the lowest and the highest stages of culture present the same phenomena.[1]

Here we have the general phases of evolution correctly indicated, though the author lays too much stress on the influence of the gentile system. But the view we have expressed is sustained in a remarkable way by the elaborate researches of Westermarck. In a series of chapters he has put it almost beyond question that a wide liberty of sexual choice on the part of the female is the rule among primitive men as it is among the lower animals.[2] Everywhere, with few exceptions, the male appears as the wooer. In the female passion is less eager.[3] She therefore requires courting, and thus in effect she secures the chief place in the function of sexual selection. Even in the case of the reproductive cells of plants, where any external difference has

[1] POST, *Familienrecht*, 158; *Afrikanische Jurisprudenz*, I, 377, 378, where will be found examples of peoples among whom free betrothal exists.

[2] WESTERMARCK, *Human Marriage*, chaps. vii–xiii, inclusive.

[3] DARWIN, *Descent of Man*, chap. viii, 222 ff.; ESPINAS, *Des sociétés animales* 323 ff. *Cf.* GROOS, *Die Spiele der Thiere*, 129 ff.

been observed, "the male cell behaves actively in the union, the female passively;" and the same law prevails among lowly organized animals.[1] In general, animals contend in some sort of rivalry for their mates. Even the most timid during the season of love "engage in desperate combats with each other for the possession of the female, and she, although comparatively passive, nevertheless often exercises a choice, selecting one of the rivals." Fighting for mates "occurs even among insects, and is of universal prevalence in the order of the vertebrata."[2] This method of courtship, not to be confused with capture, may also have prevailed among "our primeval human ancestors," and it still exists in many forms. Sometimes a fist-fight, a battle with clubs, a duel with bows and arrows, or a "pulling-match" settles the claims of rival suitors; and often, as among the North American aborigines, the contest takes the form of "wrestling for wives."[3]

But animals have other means of wooing their mates. To this end the male in a much higher degree than the female is provided with certain notes or calls, strong odors, beautiful top-knots, fine plumes, brilliant colors, or similar ornaments. Even with the most pugnacious species of birds, says Darwin, "it is probable that the pairing does not depend exclusively on the mere strength and courage of the male; for such males are generally decorated with various ornaments, which often become more brilliant during the breeding season, and which are sedulously displayed before the females. The males also endeavor to

1 Westermarck, *op. cit.*, 157; Sachs, *Text-Book of Botany*, 897; Darwin, *op. cit.*, chap. viii; Kulischer, *Die geschlechtliche Zuchtwahl*, in *ZFE.*, VIII, 140 ff., who regards the dance as originally a form of wooing. Such is also the view of Espinas, *op. cit.*, 305 ff.; and Groos, *op. cit.*, 257 ff., 263 ff.

2 Westermarck, *op. cit.*, 159, 253; Darwin, *op. cit.*, chap. xiii; Wallace, *Darwinism*, 282 ff.

3 Martius, *Rechtszustande*, 589; *idem*, *Ethnographie*, I, 111; Waitz, *Anthropologie*, III, 101; Darwin, *op. cit.*, chap. xix, 561 ff.; Lubbock, *Origin of Civilization*, 101 ff.; and especially Westermarck, *op. cit.*, 159–63, who gives many examples.

charm their mates by love-notes, songs, and antics; and the courtship is, in many instances, a prolonged affair. Hence it is not probable that the females are indifferent to the charms of the opposite sex, or that they are invariably compelled to yield to the victorious males. It is more probable that the females are excited, either before or after the conflict, by certain males, and thus unconsciously prefer them."[1] Such colors, love-songs, and ornaments belong to what Darwin calls the "secondary sexual characters." For, in the sexual selection, the "struggle is of two kinds; in the one it is between the individuals of the same sex, generally the males, in order to drive away or kill their rivals, the females remaining passive; whilst in the other, the struggle is likewise between the individuals of the same sex, in order to excite or charm those of the opposite sex, generally the females, which no longer remain passive, but select the more agreeable partners."[2] These characters, he thinks, depend upon the æsthetic sense of the females. "Just as a man can give beauty, according to his standard of taste, to his male poultry, or more strictly can modify the beauty originally acquired by the parent species, ... so it appears that female birds in a state of nature, have by a long selection of the more attractive males, added to their beauty or other attractive qualities."[3] Brilliant colors, for instance, have thus been acquired by birds and insects because they are "beautiful or otherwise agreeable, whereas the characters resulting from natural selection have been acquired because they are useful." Hence "far from co-operating with the process of natural selection, sexual selection, as described by Mr. Darwin, produces effects disadvantageous to the species;"[4] for many of the secondary characters are a source of danger.[5] But Wallace, in his

[1] DARWIN, *op. cit.*, chap. xiii, 367; chap. viii, 214 (prolonged courtship of animals). *Cf.* WESTERMARCK, *op. cit.*, 159.

[2] DARWIN, *op. cit.*, chap. xxi, 614.

[3] *Ibid.*, chap. viii, 211; *cf. ibid.*, 496, 554.

[4] WESTERMARCK, *op. cit.*, 241.

[5] DARWIN, *op. cit.*, chap. xvi, 496.

well-known criticism of Darwin,[1] has established a probability that their primary purpose is not æsthetic, but utilitarian. "The fundamental or ground colors of animals," he says, "are very largely protective;" and these are extended in the line of the greatest structural and nervous development.[2] They are therefore an evidence of a surplus of nervous energy, which is especially active at the excitable period of courtship. So far as the female exercises a choice, it is not because the males are beautiful, but because they are "the most vigorous, defiant, and mettlesome." The view of Wallace is supported in the main by that of Westermarck, who especially emphasizes the fact that colors and the other secondary characters are "upon the whole advantageous, inasmuch as they make it easier for the sexes to find each other." They exist to be *seen*. By association of ideas it is natural that the females should find them pleasing, for to them they are the "symbols of the most exciting period of their lives."[3] Furthermore, "the greatest advantage is won with the least possible peril;" for "usually they occur in males only, because of the females' greater need of protection. They are not developed till the age of reproduction, and they appear, in a great many species, only during the pairing season."[4] It follows, therefore, that

[1] WALLACE, *Darwinism*, 268-300; also his *Tropical Nature*, 221-48.

[2] Accepting TYLOR'S results in *Coloration of Animals and Plants* (London, 1886).

[3] WESTERMARCK, *op. cit.*, 252, 249. WALLACE has also noted the use of colors as a means of recognition: *Darwinism*, 217 ff.; and admits that the sexual colors may become *pleasing* to the females, though they may be devoid of an æsthetic sense. This alleged inconsistency is criticised by POULTON, *Colours of Animals*, 286.

[4] WESTERMARCK, *op. cit.*, 240-52, especially 241, 244, 251, 252.

For a comparison of the different theories of sexual selection see GEDDES AND THOMPSON, *Evolution of Sex*, 3-30, who think the truth lies between the views of Darwin and Wallace; POULTON, *op. cit.*, 284-335, who sustains Darwin's view; and FINCK, *Primitive Love*, 229 ff., who attempts "to demolish the theory of sexual selection in reference to the lower races of man as Wallace demolished it in reference to animals." *Cf.* ESPINAS, *Des sociétés animales*, 290 ff.; BROOKS, *Law of Heredity* (1883), 166-241; GROOS, *Die Spiele der Thiere*, 230 ff., 267 ff., who takes a medial position between Darwin and Wallace; WEISMANN, *Studies in the Theory of Descent* (London, 1882), I, 161 ff.; EIMER, *Die Entstehung der Arten* (1888); and GEDDES, articles "Reproduction," "Sex," "Variation and Selection," in *Encycl. Brit.*

sexual selection is but another aspect of natural selection, and the secondary sexual characters are perpetuated in harmony with the law of survival of the fittest. Whichever view is accepted, the fact with which we are especially concerned remains: the female exercises the function of choice.

Turning now to the human race, we find that the same law prevails. Savage and barbarous men are passionately fond of self-decoration and display. "There are peoples," says Westermarck, "destitute of almost everything which we regard as necessaries of life, but there is no people so rude as not to take pleasure in ornaments;" and he quotes Spencer's remark that, great as is the vanity of the civilized, it is exceeded by the vanity of the uncivilized.[1] Every sort of decoration is in use. Attention is paid especially to the arrangement of the hair. The body is disfigured or transformed in a variety of ways. The ears, nose, or cheeks are pierced or bored, and rings or other ornaments inserted. The teeth are colored or otherwise mutilated; and the body is scarred, painted, or tattooed.[2] Now it is demonstrated by wide observation that the pri-

[1] WESTERMARCK, *op. cit.*, 165; SPENCER, *Principles of Sociology*, I, 71, 72. *Cf.* DARWIN, *op. cit.*, I, chap. xix, 573 ff., 556–85, for a general discussion of the "secondary sexual characters of man."

[2] WESTERMARCK, *op. cit.*, 168–82, holds that tattooing is primarily a means of sexual attraction. The same is true of circumcision, 201–6; and of clothing, 186–212. The facts "appear to prove that the feeling of shame, far from being the original cause of man's covering his body, is, on the contrary, a result of this custom." When not due to climate, it "owes its origin, at least in a great many cases, to the desire of men and women to make themselves mutually attractive," 211. But see HELLWALD, *Die mensch. Familie*, 60–96, who ascribes clothing, not to shame, but the love of ornament; and FINCK, *Primitive Love*, 247 ff., who entirely rejects Westermarck's view, alleging, as a matter of fact, that tattooing "has had from the earliest recorded times more than a dozen practical purposes, and that its use as a stimulant of the passion of the opposite sex probably never occurred to a savage until it was suggested to him by a philosophizing visitor." On circumcision see KOHLER, in *ZVR.*, XI, 429, 430; VI, 417–19, reviewing WILKEN, *De besnijdenis bij de volken van den Indischen Archipel* (1885); PLOSS, *Das Kind*, I, 342 ff., 367 ff.; HELLWALD, *op. cit.*, 362; LIPPERT, *Kulturgeschichte*, II, 317, who believes circumcision originated as a form of expiation. CRAWLEY, *Mystic Rose*, 135 ff., regards tattooing, circumcision, and other mutilations, not as ornaments, but as "practically" amulets or charms to secure the safety of organs and functions.

mary purpose of self-decoration is the stimulation of sexual passion. In all parts of the world the desire for it "is strongest at the beginning of the age of puberty," all such customs "being practiced most zealously at that period of life."[1] The "common notion that women are by nature vainer and more addicted to dressing and decorating themselves than men" does not hold good, at any rate for savage and barbarous peoples. The females are, of course, often fond of adornment, in this way trying to please or attract their lovers. In some cases tattooing is practiced "exclusively or predominately" by the women, and "the men sometimes wear fewer ornaments;" but as a general rule it is the man who shows the greater desire to beautify himself as a means of gaining the favor of the opposite sex.[2] The woman requires to be wooed, for she is more fastidious than man in the choice of a mate. "A Maori proverb says, 'Let a man be ever so good-looking, he will not be much sought after; but let a woman be ever so plain, men will still eagerly seek after her.'"[3] Besides, it is remarked that "very generally among the lower races, the females are even more unattractive in aspect than the males."[4] But both sexes co-operate in the process of selection; and as social institutions are developed man shares in it more and more. In this way are transmitted the distinctive mental and physical characteristics of each race which are necessary to its survival, and upon which its standard of beauty depends.[5]

[1] This conclusion of Westermarck is disputed by FINCK, *op. cit.*, 261 ff.

[2] WESTERMARCK, *op. cit.*, 173 ff., 182 ff. *Cf.* DARWIN, *op. cit.*, 577 ff., 597 ff., who thinks women among savages are fonder of ornament than men; but the context shows that he does not refer to our "progenitors."

[3] WESTERMARCK, *op. cit.*, 253. DARWIN, *op. cit.*, chap. xx, 596 ff., holds this view, in the case of the "secondary sexual characters," for our "progenitors."

[4] SPENCER, *op. cit.*, I, 747; *cf.* WESTERMARCK, *op. cit.*, 273, 277, 278.

[5] That standards of beauty depend upon racial difference is urged by WESTERMARCK, chap. xii, especially 273 ff., against DARWIN, *op. cit.*, chap. xx, 595–99, who holds that racial differences are due to different standards of beauty. On female beauty and ideals of beauty among all races see PLOSS's full and interesting discussion: *Das Weib*, I, 59–124.

If the law of sexual selection has been rightly stated, it would, indeed, be strange if women among low races should not preserve some liberty of choice in marriage. In the savage state, says Darwin, man keeps woman in a far more abject position "than does the male of any other animal;" and hence it is not surprising that "he should have gained the power of selection."[1] But it must not be forgotten that even the lowest races of which we have any knowledge have advanced far beyond the primordial state of man. Darwin himself comes to the conclusion, after examining the evidence, that savage "women are not in quite so abject" a condition as is commonly supposed;[2] and the facts show that in a vast number of cases they have a decisive, though not always a legal, voice in the choice of a husband.

According to Post, the right of assent is subject to the following principal variations:[3] (1) Among a large number of peoples the contract or bethrothal is made by the parents or relatives, no regard at all being had to the will either of the bride or bridegroom.[4] Infant-marriage or betrothal, in particular, is of frequent occurrence; and sometimes children are promised even before they are born. Naturally such engagements are often merely contracts of sale; but usually they have a deeper social significance as a means of extending and more firmly knitting the bonds of family or gentile union. This custom implies something more than mere brutal indifference to the wishes of the children; and, besides, it serves the ethical purpose of restricting the sexual

[1] DARWIN, *op. cit.*, chap. XX, 597.

[2] *Ibid.*, chap. XX, 597-99.

[3] POST, *Familienrecht*, 166-71, 163, 157 ff.

[4] In such cases the right of betrothal belongs either to the parents, to the families, or to particular relatives, as, for instance, to the mother, eldest brother, or maternal uncle of the bride: POST, *Familienrecht*, 162-64, 166, 167; *idem*, *Anfänge des Staats- und Rechtslebens*, 32, 33. See WESTERMARCK, *op. cit.*, 213-15, notes, for examples. In West-Australia the consent of the whole tribe is necessary to a girl's marriage: WESTERMARCK, 215; KOHLER, in *ZVR.*, III, 357 ff.; VI, 398.

liberty of the bride.[1] Such a contract is not always legally binding upon the children, especially the bridegroom; and when it is binding, the betrothed often disregard it, or the bride runs away with another man.[2] (2) In some cases the consent of the bride alone is ignored;[3] (3) in others her approval is asked *pro forma*, but refusal never occurs and would not be tolerated;[4] (4) or the choice may, in fact, be left to the young man and woman, while the right of betrothal belongs to the guardian. With the Bataks of Sumatra, for instance, vows and pledges are exchanged by the lovers; and in case the girl is betrothed by her parents against her will, she may run away to the giver of the love-pledge, who is then compelled to receive her. A similar rule prevails in Timor and among the Tscherkese of Asia Minor.[5] Sometimes (5) the young people are legally bound to submit to the choice of the guardian only in case of the first marriage, which, accordingly, is often dissolved after a few years or even a few months; while the second marriage, being usually a marriage of inclination, may long endure.[6]

[1] According to POST, *Familienrecht*, 205, the purpose is always *Familienverbindungen anzuknüpfen;* and usually the betrothed bride is held strictly to a life of chastity, even among peoples where such is not the custom for girls: POST, *op. cit.*, 212, 213; LIPPERT, *Geschichte der Familie*, 149, 150. Of this, good examples are found in the South Sea: KOHLER, "Studien," *ZVR.*, V, 356; see also STARCKE, *Primitive Family*, 212, 256, 257; WAKE, *Marriage and Kinship*, 78–80; POST, *Geschlechtsgenossenschaft*, 80; *Ursprung*, 57; *Anfänge des Staats- und Rechtslebens*, 35; *Afrikanische Jurisprudenz*, I, 365–71; WESTERMARCK, *op. cit.*, 213, 214. On early betrothals see further KOHLER, in *ZVR.*, V, 342, (Aleuts); VI, 166 (Burma); VII, 352 (Australia), 372 (New Guinea); X, 99–103, 116 (Bombay); XI, 164 (India); SPENCER AND GILLEN, *Native Tribes of Cent. Australia*, 558.

[2] POST, *Familienrecht*, 213. Of course, in case of breach, the parents or other contracting parties are subject to fine, damage, or restitution, in a variety of ways: *ibid.*, 214; WESTERMARCK, *op. cit.*, 224.

[3] POST, *Afrikanische Jurisprudenz*, I, 362, 363, gives many examples. *Cf. idem*, *Familienrecht*, 167.

[4] This is the rule among Jackuts, the Sarts of Turkestan, and the southern Slavs: POST, *op. cit.*, 167, 168; KRAUSS, *Sitte und Brauch der Südslaven*, 320.

[5] POST, *op. cit.*, 168, 169.

[6] Such is the case among the Menangkabaw Malays of Sumatra; and, according to Burmese law, the woman who has once been married has no guardian: POST, *op. cit.*, 169.

Again (6), even among such rude peoples as the Timorlaut islanders, the consent of the betrothed is sometimes essential to a valid marriage;[1] and still more striking are those cases (7) in which the bride and bridegroom themselves appear as the contracting parties, the right of assent now belonging to the parent or guardian. The legal conditions are thus reversed.

Free marriage in one or the other of these forms is very widely diffused, though it may not always be possible to determine the exact legal relation of the guardian and the betrothed.[2] Sometimes self-betrothal and contract by the guardian are found side by side. Such is the case in Rotuma; and among the Turks of middle Asia the conventional marriage, in which the couple are contracted by their fathers in childhood, is found in connection with natural marriage which rests upon the vows of the betrothed.[3]

IV. PRIMITIVE FREE MARRIAGE SURVIVING WITH PURCHASE, AND THE DECAY OF THE PURCHASE-CONTRACT

It is commonly assumed that where marriage by purchase exists woman must necessarily be in an abject condition. The "average facts," says Spencer, "show that at first women are regarded by men simply as property, and continue to be so regarded through several later stages: they are valued as domestic cattle."[4] Such also is the opinion of Letourneau, who takes a very pessimistic view of the early condition of woman. During a long period her

[1] POST, *op. cit.*, 169.

[2] For many examples in America, Africa, Asia, and the island groups, see WESTERMARCK, *op. cit.*, 215–21; DARWIN, *op. cit.*, chap. xx, 597–99.

[3] POST, *op. cit.*, 158; VÁMBÉRY, *Das Türkenvolk* (1885), 229, 230.

[4] SPENCER, *Principles of Sociology*, I, 748, 750. Elsewhere he says: "The only limit to the brutality women are subjected to by men of the lowest races is the inability to live and propagate under greater;" but, he adds, savage women are just as selfish and just as cruel as men, they only lack the *power*. A captured or purchased woman is an "absolute possession."—*Ibid.*, I, 746–49.

wishes in marriage were utterly ignored. The sale of women and children for slaves or wives is the result of brute force and the primitive despotism of man. Marriage by purchase, he says, "implies a profound disdain of woman, her complete assimilation to movables, to cattle, to things in general."[1] Doubtless among low races the lot of woman is often extremely harsh and degraded. The examples already given demonstrate that she is sometimes treated merely as an object of sale or exchange; and where polygyny exists wife-purchase may have a strong tendency to reduce her to slavery.[2] But a more careful examination of the evidence proves that marriage by purchase is not inconsistent with a high degree of matrimonial choice on the part of the woman. As already suggested, purchase is far from being the original method of contracting marriage. Like the patriarchal authority in general,[3] by which the liberty of the son as well as that of the daughter is sometimes destroyed, it is of comparatively late origin, arising with the institution of property and an appreciation of the economic value of labor. "It may be said generally that in a state of nature every grown-up individual earns his own living. Hence there is no slavery, as there is, properly speaking, no labour." A man then had no reason "to retain his full-grown daughter; she might go away, and marry at her pleasure."[4]

[1] LETOURNEAU, *L'évolution du mariage*, 150, 130 ff. KOHLER, in *ZVR.*, V, 338 ff.; VI, 342, 343; VIII, 242; XI, 416, 423, appears to take the same position. *Cf.* also his "Indisches Ehe- und Familienrecht," *ZVR.*, III, 357 ff.; and LUBBOCK, *Origin of Civilization*, 99 ff.; POST, *Familienrecht*, 201-5; FRIEDRICHS, in *ZVR.*, VIII, 377, notes; BERNHÖFT, in *ZVR.*, IV, 234; *idem*, *Staat und Recht der röm. Königszeit*, 196 ff.

[2] WAKE, *Marriage and Kinship*, 180, 183, 198 ff., holds, against Kames, that even in the case of polygyny the evil effects of purchase may be exaggerated, though they are often bad.

[3] WESTERMARCK, *op. cit.*, 223-35, gives a detailed discussion of the paternal power as to the liberty of the son. Very often, though not so generally as the daughter, he is denied freedom of choice in marriage.

[4] *Ibid.*, 222. STARCKE, *Primitive Family*, 256, 257, emphasizes the importance of female labor in early marriage; and this fact is well established by Grosse in the book already analyzed.

In marriage by purchase there is still a chance for the wooer; and the unwilling maiden has many an opportunity to avoid a husband whom she does not fancy.[1] Elopement has its chief significance in this connection. Instead of being necessarily a relic of wife-capture, it is rather the means by which the lovers, particularly the bride, maintain the actual right to dispose of themselves in marriage.[2] Many illustrations of this fact might be presented. Among the aborigines of North and South America, where, as we have seen, wife-purchase and even wife-capture are common, woman possesses a wide liberty of choice. In arctic regions the wife sometimes runs away from the husband forced upon her and joins her lover;[3] and in general the maiden often thus escapes a detested suitor. Such is the case, for instance, among the Greenlanders, Dakotas, Caribs, and Patagonians;[4] while among the Abipones, according to Dobrizhoffer, when a man thinks fit to choose a wife, he must bargain with the

[1] On the place of the wooer in wife-purchase see LEIST, *Alt-arisches Jus Gentium*, 130 ff. What Spencer says of marriage by service is true in a high degree of marriage by purchase in general: SPENCER, *op. cit.*, I, 754, 755.

[2] On the radical difference between elopement and capture see FISON AND HOWITT, *Kamilaroi and Kurnai*, 354, 343, 348-51; and compare PLOSS, *Das Weib*, I, 53, 54; WESTERMARCK, *op. cit.*, 223.

[3] DARWIN, *op. cit.*, chap. XX, 597, 598.

Among the Point Barrow Eskimo marriages are formed for "reasons of interest." Sometimes a wife is taken against her will. Yet "women appear to stand on a footing of perfect equality with the men both in the family and in the community." The "wife is the constant and trusted companion of the man in everything except the hunt, and her opinion is sought in every bargain or other important undertaking."— MURDOCH, in *IX. Rep. of Bureau of Eth.*, 410, 413, 414. *Cf.* EGEDE, *Greenland*, 144.

[4] WESTERMARCK, *op. cit.*, 216, 9. CAPTAIN MUSTERS, *At Home with the Patagonians* (1872), affirms that the finest trait of the Patagonian "Tehuelches character is 'their love for their wives and children; matrimonial disputes are rare, and wife-beating unknown; and the intense grief with which the loss of a wife is mourned is certainly not 'civilized,' for the widower will destroy all his stock and burn all his possessions,' and possibly become careless of his life." A similar affection is shown among the Eskimo, who are also polygynous: WAKE, *Marriage and Kinship*, 184, 185.

Free courtship exists among the Omahas: DORSEY, "Omaha Sociology," *III. Rep. of Bureau of Eth.*, 259, 260; and in general there is sometimes individual choice among the Siouan peoples: *idem*, "Siouan Sociology," *ibid.*, XV, 178.

parents of the girl about the price. But "it frequently happens that the girl rescinds what had been settled and agreed upon . . . . obstinately rejecting the very mention of marriage. Many girls, through fear of being compelled to marry, have concealed themselves in the recesses of the woods or lakes; seeming to dread the assaults of tigers less than the untried nuptials. Some of them, just before they are to be brought to the bridegroom's house, fly to the chapel, and there, hidden behind the altar, elude the threats and the expectation of the unwelcome" suitor.[1] In exactly the same way she gains her will in Tierra del Fuego, where the lover serves for his bride;[2] and among the same people "the eagerness with which the women seek for young husbands is surprising, but even more surprising is the fact that they nearly always attain their ends."[3] The Comanche suitor must buy his bride of her parents; but unless she manifests her willingness by leading his pony into the stall, the bargain is void.[4] A similar freedom in choosing her mate is asserted by the woman of the Pueblos, Creeks, Chippewas, and various other tribes;[5] while the existence of real affection and true courtship is shown by the fact that suicide sometimes happens on account of disappointed love.[6]

[1] DOBRIZHOFFER, *Account*, II, 207; *cf.* DARWIN, *op. cit.*, chap. XX, 598; and PLOSS, *Das Weib*, I, 53, 54; KLEMM, *Kulturgeschichte*, II, 75.

[2] DARWIN, *op. cit.*, chap. XX, 598; WESTERMARCK, *op. cit.*, 216.

[3] WESTERMARCK, *op. cit.*, 216, and authorities there cited.

[4] PLOSS, *op. cit.*, I, 53.

[5] Among the Kaniagmuts, Thlinkets, Nutkas, and the South American Guanás: WESTERMARCK, *op. cit.*, 215, 216. Divorce is free among the South American Charuas: DARWIN, *op. cit.*, 598. For evidence of courtship and consent among the California Indians see BANCROFT, *Native Races*, I, 398, 411, 412. SPENCER, *op. cit.*, I, 722, 723, 754, 755, discusses the favorable position of women among the American aborigines and elsewhere, due in part to "likeness of occupations between the sexes." For further illustrations of freedom of choice or of liberty in the family see PRATZ, *Hist. de la Louisiane*, II, 385, 389; WAITZ, *Anthropologie*, III, 101, 103; RATZEL, *Hist. of Mankind*, II, 125, 128.

[6] RIGGS, "Dakota Grammar," *Cont. N. A. Eth.*, IX, 206, gives an example. *Cf.* also the cases mentioned by WESTERMARCK, *op. cit.*, 215.

Free marriage, very often in connection with wife-purchase, prevails widely throughout the African peoples. Accounts differ as to the Kafirs. According to Fritsch, a woman is bought like any chattel.[1] But Leslie declares that generally the man first tries to win her consent; for it is "a mistake to imagine that a girl is sold by her father in the same manner, and with the same authority, with which he would dispose of a cow."[2] On the other hand, Fritsch shows that the heart of the Bechuana, and especially that of the despised Bushman, "is not so full of his oxen," the woman having some liberty of choice.[3] Winwood Reade informed Darwin, with respect to the negroes of western Africa, that "the women, at least among the more intelligent pagan tribes, have no difficulty in getting the husbands whom they may desire, although it is considered unwomanly to ask a man to marry them. They are quite capable of falling in love, and of forming tender, passionate, and faithful attachments."[4]

Throughout all Micronesia and in many parts of Melanesia marriage implies the consent of the betrothed. The New Caledonian girl is thus always consulted; and, if forced to obey her parents, she takes the first opportunity to elope with the man of her choice.[5] In the New Britain group "after the man has worked for years to pay for his

[1] FRITSCH, *Die Eingeborenen Süd-Afrikas*, 112, 113; with whom WAKE, *op. cit.*, 213, 215, agrees.

[2] WESTERMARCK, *op. cit.*, 220; LESLIE, *Among the Zulus and Amatongas*, 194; *cf.* also PLOSS, *Das Weib*, I, 54; DARWIN, *op. cit.*, 598. The despotic power of the husband is modified in practice through influence of the wife's friends: REHME, in *ZVR.*, X, 39, 40, 41, 42; RATZEL, *Hist. of Mankind*, II, 434.

[3] FRITSCH, *Die Eingeborenen Süd-Afrikas*, 192, 444, 445.

[4] DARWIN, *op. cit.*, 599. Freedom of choice in varying degrees, often with wife-purchase, prevails among the Ashantees, Loangos, Sognos, Shulis, Mádis, Marutses, Hottentots, and Gold Coast negroes: WESTERMARCK, *op. cit.*, 220, 221; PLOSS, *op. cit.*, I, 54. *Cf.* WAKE, *op. cit.*, 214, 215; MUNZINGER, *Ostaf. Studien*, 146, 207, 324; WAITZ, *Anthropologie*, II, 116, 117.

[5] For these examples see WESTERMARCK, *op. cit.*, 218, notes.

wife, and is finally in a position to take her to his house, she may refuse to go, and he cannot claim back from the parents the large sums he has paid them in yams, cocoa-nuts, and sugar-canes."[1] Betrothal by the guardian and self-marriage appear together in Burma. In the first case the daughter is given by her father in return for service and gifts. Her consent is not essential; but if she runs away from her husband more than three times, she is free, and her parents retain the gifts. In the second case the girl elopes without the guardian's consent, a recognized marriage relation being thus established, though the guardian may reclaim the bride. Should she, however, return thrice to her husband, she remains his legal wife.[2] "Among the Minahassers of Celebes courtship or love-making 'is always strictly an affair of the heart and not in any way dependent upon the consent or even wish of the parents.'"[3] The Rejang suitor of Sumatra elopes with the girl and pays the price afterwards; and such is often the case in Australia, among the uncivilized tribes of India, and throughout the Indian Archipelago. In all these cases, as well as among some of the Turanian peoples of central and northern Asia, the choice of the woman, even without elopement, is usually decisive, though often the arrangement of the marriage belongs legally to the parents.[4]

[1] WESTERMARCK, *op. cit.*, 218. According to KOHLER, "Studien," *ZVR.*, V, 385, actual wife-capture still exists in the New Britain islands. "Es kommt vor, dass die Frau dem ersten Mann weggenommen wird und dass die Leiche des getödteten ersten Mannes das Hochzeitsmahl bildet."—POWELL, "Unter den Cannibalen," *Globus* (1884), 328.

[2] KOHLER, "Das Recht der Birmannen," *ZVR.*, VI, 166, 168.

[3] WESTERMARCK, *op. cit.*, 219.

[4] See WESTERMARCK, *op. cit.*, 218–20, and the many examples there mentioned, with citation of the sources; and compare POST, *Familienrecht*, 166, 168, 169, *passim;* KOHLER, in *ZVR.*, V, 354 ff.; WAKE, *op. cit.*, 215, 216; PRJÉVALSKI, *Mongolie et pays des Tangoutes* (1880), 47, 207; HUC, *Travels in Tartary*, I, 52, 185. For female choice in Australia: FISON AND HOWITT, *Kamilaroi and Kurnai*, 234, 242, 326, 327 (Kurnai); 276, 280, 289, 348–54 (elopement). The Kalmuck wife is a free woman: KOEHNE, "Das Recht der Kalmücken," *ZVR.*, IX, 463; and WAKE gives interesting proofs of the coexistence of real affection with polygyny and purchase: *op. cit.*, 218.

It is very easy to exaggerate the bright as well as the dark features of primitive social life. The reports of travelers, often untrained in the interpretation of the facts which they observe, are notoriously untrustworthy. It is extremely difficult to discern the motives which actuate men in a stage of culture remote from our own. Nevertheless it seems certain that the position of uncivilized woman with respect to marriage is not quite so hopeless as is generally imagined. The facts appear to demonstrate that woman's original liberty of selection has never been entirely lost. It is evident that wife-purchase, though sometimes the means of degradation, even of marital bondage, is compatible with a high degree of matrimonial choice. The ideas which influence the "uncivilized" man in selling his daughter are probably often very similar to those which govern the thrifty father in modern society when he insists on securing a good "match" for his child. The price is regarded as a fair equivalent for the services to which the parent is justly entitled in return for rearing the girl.[1] The Kafir maiden who brings a good price from her suitor is not therefore necessarily a "chattel" any more than is the daughter whose labor the civilized parent lets out for hire.[2] A high price may be looked upon also as a proper recognition of the rank or of the mental and physical attractions of the bride.[3] Furthermore, it is significant that actual bride-purchase may

[1] So among the Kafirs: SHOOTER, *The Kafirs of Natal and the Zulu Country* (London, 1857), 49: WESTERMARCK, *op. cit.*, 402; and among other tribes: *ibid.*, 402, note.

[2] Compare the remark of WAKE, *op. cit.*, 199, who, in speaking of purchase in its relations to polygyny, says: "It may be doubted whether the ideas which govern such a transaction (wife-purchase) are very different from those which guide persons under similar circumstances in monogamatic societies. When the savage buys a girl to be his wife, it is for the purpose of having, if not a companion, a helpmate, and a mother of his children, and her father parts with her for those objects."

[3] Accordingly, it is sometimes regarded as a disgrace to marry without payment of the bride-price; and the girl takes pride in the amount she brings to her father. For examples see WAKE, *op. cit.*, 183, 191; BANCROFT, *Native Races*, I, 277, 349, 350; POWERS, *Tribes of California*, 22, 56.

coexist with advanced ethical and religious conceptions of the marriage state. Such, according to Kohler, is the case in the Punjab, where the courts under British rule have decided that the sale of a woman to be a wife is not punishable as a crime under the statute forbidding the sale of a human being into slavery;[1] and Leist has shown that in the *dharma* period of early Aryan history the purchased wife was not regarded as a "thing," but in the fullest sense as a free wife entitled to share the *sacra* of the husband's house. Nay, the actual payment of the legal bride-money in certain cases was the only means through which marriage by purchase could reach the proper ethical end of legitimate marriage: the birth of a son to perpetuate the ancestral worship.[2]

Another fact, sometimes misinterpreted, seems to point clearly to the persistence of original free marriage. It is highly significant that wife-purchase appears never to have existed at all among a certain number of very low races, with which nevertheless marriage rests on the free consent of the parties. Such is the case among the California Wintun, the Alaskan Yukonikhotana, the Andamanese, the Chittagong hill tribes, and certain African peoples. Among the "Pádams, one of the lowest peoples of India, it is customary for a lover to show his inclinations whilst courting by presenting his sweetheart and her parents with small delicacies, such as field mice and squirrels, though the parents seldom interfere with the young couple's designs, and

[1] KOHLER, "Die Gewohnheitsrechte des Pendschabs," *ZVR.*, VII, 227. *Cf.* TUPPER, *Punjab Customary Law*, III, 9, who gives the decision referred to; and LEIST, *Alt-arisches Jus Gentium*, 46, 47.

[2] We have here the case of an "appointed daughter." The son of a "brotherless maiden" was sometimes reserved to be the heir of her father, not of her husband. How could a man marry such a brotherless girl and secure himself in the possession of his child, to continue his own hearth-worship? This might be effected by payment of the "official" price of one hundred cows and one wagon (*Wagen*), and this was so even in the later period when the law-books frowned upon wife-purchase: LEIST, *op. cit.*, 110 n. 10, 127 n. 3, 130, 131, and the references to the ancient law-books there given.

it would be regarded as an indelible disgrace to barter a child's happiness for money."[1] So likewise with the Veddahs[2] either no presents are given on either side, or else the ceremony consists simply in offering some food to the parents of the bride; and elsewhere the proffer of similar "wooing-gifts," without previous stipulation, must be looked upon either as a token of good-will or as an indication of the ability of the bridegroom to provide for a wife, rather than as a means of purchase.[3] The probational marriages of the Seri Indians appear to have a like significance.[4] May we not go a step farther? Is it not probable that the widely diffused custom of bestowing presents of greater value, even where the amount is established by usage or previous agree-

[1] WESTERMARCK, *op. cit.*, 397.

[2] Compare SARASIN, *Die Weddas von Ceylon*, I, 460, 461. Sometimes girdles (*Lendenschnuren*) are exchanged by bride and groom. Free courtship exists; and this primitive people presents a notable example of the pairing-family. The English author DEBUTTS naïvely remarks, "The savage Veddahs live in pairs like the beasts of the forest": SARASIN, *op. cit.*, I, 549.

[3] Such is the case among the Ainos of Yesso and the Brazilian Puris, Coroados, and Coropos: WESTERMARCK, *op. cit.*, 397, 398. Among the Polynesians the present seems to be designed to gain the good-will of the wife's parents, but when the wife's family is the inferior in rank, the husband, though rendering the wooing-gift, receives a dower with his bride: WAKE, *op. cit.*, 390. On the "wooing-gift" see POST, *Familienrecht*, 173, 175; *idem*, *Afrikanische Jurisprudenz*, I, 342 ff.; KOHLER, in *ZVR.*, V, 356; KOEHNE, *ibid.*, IX, 461 (Kalmucks); HILDEBRAND, *Ueber das Problem*, 17 ff., who, as already noted, regards gift as preceding purchase; and CRAWLEY, *Mystic Rose*, 386 ff., who holds that "the so-called bride-price was originally of the same class as the *kalduke*, a pledge, a part of one's self, given to another and received from him."

[4] Among the Seri the woman has much liberty of choice: "certainly she holds the power of veto, ostensible if not actual." During the preliminary courtship she occupies a position of great dignity. "When all parties concerned are eventually satisfied a probationary marriage is arranged, and the groom leaves his clan and attaches himself to that of his bride. Two essential conditions — one of material character and the other moral — are involved in this probationary union; in the first place the groom must become the provider for, and the protector of, the entire family of the bride." For a year he thus shows his "skill in turtle-fishing, strength in chase, subtlety in warfare, and all other physical qualities of competent manhood. . . . . During the same period the groom shares the jacal and sleeping robe provided for the prospective matron by her kinswomen, not as a privileged spouse, but merely as a protecting companion; and throughout this probationary term he is compelled to maintain continence — *i. e.*, he must display the most indubitable proofs of moral force." To this kind of service the character of wife-purchase is denied: MCGEE, "The Seri Indians," *XVII. Rep. of Bureau of Eth.*, Part I, 279 ff.

ment, may sometimes be due to like motives? Though, as a rule, the presentation of such gifts represents a "weakened" form of wife-purchase, it does not seem necessary to assign the origin of the practice to a single cause. The same is true of the custom of exchanging presents between the two families. Usually it is rightly explained as a stage in the decay of purchase and in the rise of the dower; but when we find the return of gifts in use among such rude peoples, for instance, as the Bechuanas, the Kalmucks, the Makassars, and the American Indians,[1] it seems reasonable to suppose that the custom, in some cases at least, may represent a ceremonial development of free marriage, taking its rise in various motives. Thus among the Todas, it has been suggested, the transaction appears as an exchange of dowers to serve as a security for the mutual good behavior of the future couple.[2] Similarly with the American Indians the gift to the bride's parents may sometimes be designed to purchase clan privileges[3] or to procure the "alliance of the wife's cabin;" while the exchange of presents, which is found where it is usual for the husband to take up his abode in the wife's home, ought perhaps to be regarded as a matrimonial compact of alliance between the two families.[4]

Nevertheless, after every allowance is made, the custom of purchasing wives bears the indelible stamp of barbarism.

[1] For these and other examples see KOHLER, "Studien," *ZVR.*, V, 342, 351. 353; POST, *Familienrecht*, 176–79; *idem*, *Ursprung des Rechts*, 65; *idem*, *Anfänge des Staats- und Rechtslebens*, 55; BANCROFT, *Native Races*, I.

[2] Among the Todas, on betrothal, "dowers" consisting of buffaloes are exchanged. If the husband discards his wife, her father demands a return of her dower; if the wife abandons the husband, his father may take back his gift. In case the marriage be canceled because the husband has not fulfilled his part of the contract he may be "fined a buffalo or two": MARSHALL, *A Phrenologist amongst the Todas*, 210–13, 217–19. Compare WAKE, *op. cit.*, 451.

[3] See the passage quoted from BOAZ, p. 191, above. The "ceremonies" may sometimes be intended to prove the man's ability to support a family: RATZEL, *Hist. of Mankind*, II, 125.

[4] WAKE, *op. cit.*, 390; LAFITAU, *Mœurs des sauvages amériquains*, I, 565, 568. *Cf.* MORGAN, *Ancient Society*, 454, on the presents to the wife's relatives among the Syndiasmians (American Indians).

Like polygyny, which it so often accompanies, it is an offense against the feelings and the dignity of woman. Therefore, often at a relatively early period of social progress, it falls into disrepute; but while it is gradually abandoned as a thing unseemly or disgraceful, traces of it may long survive. On the one hand, as in the case of the Roman *coemptio*, the Hindu *ārsha*, the Anglo-Saxon *beweddung*, or the Jewish contract with the penny, the form of sale is present in the wedding ceremony; or, on the other hand, the bride-money, though still rendered, comes in time to be regarded as simply a compensation for the guardianship of the woman;[1] or else, passing through several intermediate stages, it is slowly transformed into a dower.[2]

In the first stage of decline the bride-price appears as a nominal compensation, out of proportion to the real value of the girl. It usually consists of presents to the wife's parents or relatives, and sometimes these are scarcely distinguishable from the "wooing-gifts" already mentioned; while later it may degenerate into a mere symbol or become a sportive social observance whose meaning is entirely forgotten.[3] Again, among a large number of peoples, custom requires that a part, sometimes all, of the gifts constituting the price, or their equivalent, shall be returned to the bridegroom or his family; and it is significant that special care is sometimes taken, as among the Indians of Oregon, "not to turn

[1] SOHM, *Eheschliessung*, 22 ff.; KÖNIGSWARTER, *Histoire de l'organisation de la famille*, 123; and WEINHOLD, *Deutsche Frauen*, I, 320, hold this view. But the point is disputed and will be recurred to in another chapter.

[2] In general, on the decay of wife-purchase, see WESTERMARCK, *op. cit.*, 402–16, who gives the fullest and most detailed account; POST, *Familienrecht*, 173–81, who discusses the stages of decline.

[3] Thus in Lovrec, Dalmatia, where the bride-price is no longer customary, when the *Brautführer*, on the day before the nuptials, comes to the bride's home for the *Brautkiste* containing her trousseau, he finds a child sitting upon it, who must be bought off through payment of a piece of gold: POST, *op. cit.*, 177. Sometimes the symbolical purchase coexists for a time with real purchase: *ibid.*, 177; *idem*, *Geschlechtsgenossenschaft*, 73; *idem*, *Grundlagen des Rechts*, 235.

over the same horses or the same articles."[1] With other peoples a part or the whole of the purchase price comes to the bride herself. Either the father turns it over as a marriage portion, or it is paid to her directly by the bridegroom. In the latter case, as Westermarck observes, it is often difficult "to make out whether the presents obtained from the bridegroom formed originally a part of the bride-price or were only a means of gaining her own consent."[2] One step more, and we reach the stage of development in which the father provides his daughters with a dotal portion out of his own substance.[3]

Thus, to summarize, it appears in general that the institution of dower takes its rise in two principal sources: either it is derived through the return gift from its exact opposite, the ancient purchase price of the bride; or, as a means of

[1] WESTERMARCK, *op. cit.*, 409 ff. For many examples of exchange of gifts see KOHLER, "Studien," *ZVR.*, V, 340, 341, 347-49, 351, 353, 365; POST, *op. cit.*, 177-79.

[2] WESTERMARCK, *op. cit.*, 409, 410, giving examples.

[3] The marriage contract had already reached this last stage among the ancient Babylonians and Assyrians. They had a remarkably high ideal of family life. The facts disclosed by the records are wholly inconsistent with Herodotus's story regarding the sacred prostitution of the unmarried women. At the nuptials it was customary to state that the bride was "pure" or "without stain." Polygyny existed only as the rare luxury of the rich. As a rule, the formation of a second marriage was equivalent to a divorce from the first. Two principles, declares SAYCE, the maternal and the paternal, "were struggling for recognition." Perhaps "they were due to a duality of race; perhaps they were merely a result of the circumstances under which the Babylonians lived. At times it would seem as if we must pronounce the Babylonian family to have been patriarchal in character; at other times the wife and mother occupies an independent and even commanding position. It may be noted that whereas in the old Sumerian hymns the woman takes precedence of the man, Semitic translation invariably reverses the order: the one has 'female and male,' the other 'male and female.'"—*Babylonians and Assyrians*, 13. The practical result was that the sexes were nearly equal in marriage. The individual and not the family was the social unit; and the individuality of the woman was fully recognized. She controlled her own property. She could buy and sell, borrow and lend, sue and be sued, and inherit equally with her brother. She might become a priestess, the head of a city, or the queen of the state. The wife was her husband's equal in the business world. The possession of property "brought with it the enjoyment of considerable authority." She "could act apart from her husband, could enter into partnership, could trade with her money, and conduct law-suits in her own name."—*Idem*, *Social Life among the Assyrians and Babylonians*, 50, 51. The bride's dower was paid by her father to the bridegroom; but it was her property. Sometimes the husband enjoyed the use of it for life; sometimes the wife disposed

providing in some way for the wife as a member of the new household, it has developed along with free marriage, and stands as an expression of the natural motives and desires upon which the human family rests. Strangely enough, in our own society the marriage portion "has become a purchase sum by means of which a father buys a husband for his daughter."[1] It may be doubted whether the ideas which actuate the modern plutocrat in such a transaction differ essentially from those of the rich savage or barbarian who succeeds in procuring a beautiful or high-born maiden in exchange for his flocks.

We have now traced the evolution of the marriage contract throughout its entire course, and are able to perceive in a measure its true place in the general history of the human family. Again the movement has been in a circle. As in the case of monogamy, the genesis of contract must be sought beyond the border-line between man and the lower animals. In the "natural history" stage of human existence marriage rested on the free consent of the man and the woman. It was an informal agreement. The man was the

of it as her private capital. It was always a means of securing her economic independence, and thus of promoting the happiness of her married life. "In this way she was protected from tyrannical conduct upon his part, as well as from the fear of divorce on insufficient grounds. If a divorce took place the husband was required to hand over to the wife all the property she had brought with her as dowry, and she then either returned to her father's home or set up an independent establishment of her own." The divorced woman might marry again if she chose. "Marriage was partly a religious and partly a civil function. The contracting parties frequently invoked the gods, and signed the contract in the presence of the priest. At the same time it was a contract, and in order to be legally valid it had to be drawn up in legal form and attested by a number of witnesses. Like all other legal documents it was carefully dated and registered."—*Idem, ibid.*, 46, 47, 49, 50. *Cf.* for the forms of contract and ceremony his *Babylonians and Assyrians*, 13-43; also the interesting account of SIMCOX, *Primitive Civilizations*, I, 360-79; her discussion of the similarly advanced domestic relations of the ancient Egyptians, *ibid.*, I, 198-225; KOHLER, "Ueber zwei babylonische Rechtsurkunden aus der Zeit Nabonids," *ZVR.*, V; and HAUPT, *Die sumerischen Familiengesetze.*

[1] In "our days, a woman without a marriage portion, unless she has some great natural attractions, runs the risk of being a spinster forever. This state of things naturally grows up in a society where monogamy is prescribed by law, where the adult women outnumber the adult men, where many men never marry, and where married women too often lead an indolent life."—WESTERMARCK, *op. cit.*, 416.

wooer, and to the woman belonged the first place in sexual choice. In obedience to the unvarying requirements of organic law, the best attributes of each race have thus been differentiated: through natural selection they represent the survival of the fittest. At a later stage of development the element of mutual consent falls somewhat into abeyance. With the rise of property, industry, and a more complex social organization, giving birth to new desires and ambitions, contract by the guardian in part supersedes self-betrothal. Purchase and its occasional alternative, capture, depriving woman of her natural right of assent, tend to reduce the wife to concubinage and domestic slavery. But fortunately the victory is not complete. Just as monogamy is never displaced by polygyny as the natural type of marriage, so the consent of woman as the normal condition of matrimonial union is never entirely destroyed by wife-purchase. With the evolution of altruism, the increase of culture, producing sympathy upon which connubial love largely depends, and the gradual recognition of the spiritual equality of the sexes, self-betrothal, like monogamy, again predominates. In short, whether regarded historically or biologically, monogamy and self-betrothal appear simply as two aspects of the same institution; they are connected by a psychic bond, and together they constitue the highest type of marriage and the family.

CHAPTER V

EARLY HISTORY OF DIVORCE

[Bibliographical Note V.—For the law and custom of divorce among uncivilized peoples the best analysis and the most painstaking classifications are given by Post in his *Entwicklungsgeschichte des Familienrechts* and the first volume of his *Afrikanische Jurisprudenz*, supplemented by the more general notices contained in his various other writings. The subject is also well treated, with the usual minute citation of authorities, in the twenty-third chapter of Westermarck's *Human Marriage*. The fourteenth chapter of Letourneau's *L'évolution du mariage et de la famille* is interesting and suggestive, but his analysis is defective; and in this connection, as elsewhere, the author is inclined to take too pessimistic a view of the juridical character of early society. Further general or special discussion may also be found in many of the works already described in previous Bibliographical Notes, especially in those of Wake, Starcke, Spencer, Mason, Unger, Bastian, Friedrichs, Smith, Krauss, Wilken, Riedel, Henrici, Bernhöft, Rehme, Hellwald, Klemm, Ratzel, Waitz, Fritsch, Munzinger, Sarasin, and the numerous papers of Kohler. For the Chinese, in connection with the books enumerated in Biliographical Note IV, read Legge, *Life and Teachings of Confucius* (3d ed., London, 1872); Doolittle, *Social Life of the Chinese* (New York, 1867); and Alabaster, *Chinese Criminal Law* (London, 1899). The literature relating to the Eskimo and the red Indians of America, mentioned in Bibliographical Note IV, yields many important notices of divorce usage. In addition read Thwaite's valuable paper on the Winnebagoes, *Wisconsin Hist. Collections*, XII (Madison, 1892). For reference to the divorce institutions among Greeks, Romans, Hebrews, and Early Germans see Bibliographical Note XI.]

I. THE RIGHT OF DIVORCE

Few of the results of recent research are more surprising than the revelation of the existence among low races of elaborate systems of unwritten law covering, often in a very orderly and comprehensive way, most of the divisions which one ordinarily associates with "civilized" jurisprudence.[1]

[1] For the proof, see, for instance, the numerous writings of Riedel, Wilken, Bastian, Friedrichs, Bernhöft, Post, and Kohler.

This is especially true of the law of divorce. The investigations of various scholars, notably those of Kohler, Letourneau, Westermarck, and Post, have disclosed among the barbarous or even savage races of mankind a careful attention to detail, a stability, and often a respect for equity, in the customary rules relating to the dissolution of marriage, which western prejudice is scarcely prepared to find; while other peoples commonly looked upon as civilized, but relatively non-progressive, such as the Chinese, are sometimes quite capable of teaching us valuable lessons in this regard.

According to the generalization of Post, who has given the most careful groupings,[1] "the laws of divorce found among the different peoples of the earth vary within the widest limits conceivable." So confusing, indeed, is the mass of custom relating to the subject that in the very outset a word of warning must be given. For in the present state of inquiry, often dependent upon superficial observation and conflicting reports, any analysis or classification, however careful, must perforce be accepted as really tentative and only in broad outline approaching the truth. Nevertheless, with regard to the liberty of divorce, following the suggestion of Post, five classes of peoples may be differentiated:

1. Very often among rude races, particularly where the "genealogical organization is little developed or in process of decay," the marriage bond is lax, and it is readily dissolved at the pleasure of either party.[2] Such is the case

[1] POST, *Familienrecht*, 75–79, 249–65; *idem*, *Anfänge*, 20, 21; *idem*, *Afrikanische Jurisprudenz*, I, 320 ff., 434 ff.; *idem*, *Grundlagen des Rechts*, 267 ff.

[2] POST, *Familienrecht*, 250–58, enumerates six classes of peoples according to the freedom of divorce: (1) the marriage relation loose and dissoluble at the pleasure of either party; (2) marriage indissoluble; (3) divorce only by mutual consent; (4) divorce the right of the husband only; (5) divorce the right of the wife; (6) divorce only on definite grounds, these grounds either being the same for either spouse or different for the man and the woman respectively. In the text examples of the fifth

with many African, Asiatic, American, and Oceanic peoples. Among the African Damaras, for instance, the wife may change her husband every week if she likes.[1] Similarly among the Shekiani, another negro tribe, the woman may abandon her spouse for mistreatment or for any other cause, returning to her native village, where her friends make it a point of honor not to give her back; and in this way wars sometimes arise.[2] Like freedom exists on the Gold Coast and among the Felups of Fogni; and very commonly in Africa the wife may leave the husband if the purchase price is returned.[3] Among the Makassars and Buginese, without assigning any cause whatever, either party may divorce the other, dividing the children between them.[4] The same is true of the endogamic Alfurese of Minahasa, with whom the cognatic system of relationship prevails.[5] Even in Burma divorce appears to be a one-sided matter, though the person dissolving the marriage suffers severe disadvantages with respect to property rights.[6] In ancient Arabia marriages

group are given in connection with the cases of divorce at the pleasure of either party; for where the wife has the right to put away or leave the husband when she likes, the husband, unless in very exceptional cases (POST, *Grundlagen*, 271), appears to have the same privilege with respect to the wife; hence Post's first and fifth groups are practically the same.

In general on the first phase, see POST, *Afrikanische Jurisprudenz*, I, 433-38; *idem*, *Grundlagen*, 267 ff.; *idem*, *Familienrecht*, 249-51; LETOURNEAU, *L'évolution du mariage*, 284 ff., 289, 290; BERNHÖFT, "Das Gesetz von Gortyn," *ZVR.*, VI, 430 ff., 434; WESTERMARCK, *Human Marriage*, 518 ff.

[1] POST, *Afrikanische Jurisprudenz*, I, 436, 437. The husband seems also to have absolute right of divorce: LETOURNEAU, *op. cit.*, 285.

[2] POST, *op. cit.*, I, 437.

[3] Among the Mundingos the wife has an action against the husband for abuse; in Soulimana she may leave him, if the bride-presents are restored; while among the Krus in such cases her relatives must repay double the purchase price; WAITZ, *Anthropologie*, II, 119, 120. Among the Charruas, where polygyny exists, the wife abandons the husband if an unmarried man will take her: KLEMM, *Kulturgeschichte*, II, 75.

[4] POST, *Familienrecht*, 251.

[5] *Ibid.*

[6] This is the conclusion of KOHLER, "Aus der Praxis des buddhistischen Rechts in Birma," *ZVR.*, VI, 389-91, following the interesting decisions in JARDINE, *Circulars (Civil and Criminal) of the Court of the Judicial Commissioner of British Burma*, 1883 (Rangoon, 1884). *Cf.* also KOHLER, in *ZVR.*, VI, 172; POST, *Familienrecht*, 251; and WESTERMARCK, *op. cit.*, 528.

were formed without ceremony, and they were ended by either spouse with equal ease.[1] But the law of the Amaxosa, constituting with the Amazulu the division of the Bantu stock commonly called "Kafirs," affords a particularly interesting example of early custom with regard to divorce and its legal consequences. Both parties enjoy the greatest freedom in dissolving the marriage; and this is all the more striking because of the prevalence of wife-purchase, which usually restricts the privileges of the woman in this regard. If the marriage is childless, however long it may have endured, the husband who proves the alleged ground of divorce is entitled to receive back the purchase price; and this is true also, in case of such a marriage, when the separation takes place on the part of the wife, unless she establishes very grave cause for her action. The divorced woman is permitted to marry again, provided the purchase price is restored to the first husband; and this in such case he is entitled to receive even when she has borne him children: for here "in all cases the children belong to the father."[2]

Divorce is a simple matter among the Point Barrow Eskimo. "As well as we could judge," writes Murdoch, "the marriage bond was regarded simply as a contract . . . .; and, without any formal ceremony of divorce, easily dis-

[1] Among the early Arabians the woman as well as the man had entire freedom of divorce. The *nikâh al-mot'a*, or temporary contract-marriage, amounted merely to a restriction of the woman's power of divorce during the short term of agreement: SMITH, *Kinship and Marriage*, 59 ff., 65 ff.; KREMER, *Kulturgeschichte des Orients*, I. 538; WILKEN, *Das Matriarchat*, 18, 9 ff.: *ap. Ammianus Marcellinus*, Book XIV, sec. iv, 4, YONGE's trans. (London, 1887), 11. By the later Arabian law, after the rise of wife-capture and wife-purchase, divorce became the sole privilege of the husband; and the same is true under the still later law. *Cf.* in general, HELLWALD, *Die mensch. Familie*, chaps. xxii, xxiii; KOHLER, "Ueber das vorislamitische Recht der Araber," *ZVR.*, VIII, 244, 248, 257; FRIEDRICHS, "Das Eherecht des Islam," *ibid.*, VII, 263–69.

[2] REHME, "Ueber das Recht der Amaxosa," *ZVR.*, X, 38, 39; *cf.* POST, *Afrikanische Jurisprudenz*, I, 436. FRITSCH, *Die Eingeborenen Süd-Afrikas*, 113, says that in cases of very cruel treatment the wife may abandon the husband and return to her family; to get her back the husband has to make an after-payment.

solved in the same way on account of incompatibility of temper or even on account of temporary disagreements."[1] Among the Santee Dakotas, where mother-right is said to prevail, "a wife's mother can take her from the husband and give her to another man." With "the Cegiha, if the husband is kind, the mother-in-law never interferes." But when he is "unkind the wife takes herself back, saying to him, 'I have had you for my husband long enough; depart.'" When the man has beaten the woman several times or been otherwise cruel, sometimes her father or elder brother says to him: "You have made her suffer; you shall not have her for a wife any longer." When a woman who has been warned against a man by her relatives repents and wishes to dissolve the marriage, her male kindred as a punishment say to her: "Not so; still have him for your husband; remain with him always."[2]

2. Passing to the opposite extreme, there are peoples with whom marriage is a relation absolutely indissoluble. Sometimes this is the case on sacramental grounds, implying usually considerable progress in religious ideas;[3] but it is also true of peoples standing on a very low plane of culture, such as certain of the Papuas of New Guinea, the Veddahs[4]

[1] In two cases wives left their husbands for bad treatment. Occasionally the man repudiates his wife; and sometimes there are several changes or exchanges before a permanent choice is made. When, however, a union is once settled, it is not easily dissolved: MURDOCH, in *IX. Rep. of Bureau of Eth.*, 411, 412. Similar freedom for both sexes prevails among the Eskimo about Bering Strait: NELSON, *ibid.*, XVIII, Part I, 292.

[2] DORSEY, "Omaha Sociology," *III. Rep. of Bureau of Eth.*, 261, 262. For further examples of easy divorce among the Indians see TURNER, "Ethnology of the Ungava District," *ibid.*, XI, 270 (Nenenot); *Report Smith. Inst.*, 1885, 71 (Pawnees marry and unmarry at pleasure); ANCHIETA, "Informação," *Revist. Trim. Hist.*, VIII, 254-62 (the woman leaves the man at pleasure in Brazil).

[3] The old Indic law does not recognize a proper divorce, though the husband may "supersede" his wife; but sometimes by the existing custom of Indian peoples it is allowed: KOHLER, in *ZVR.*, III, 384, 386 ff.; VII, 236; XI, 169. *Cf.* FRIEDRICHS, *ibid.*, X, 251; WESTERMARCK, *op. cit.*, 525; LETOURNEAU, *op. cit.*, 301, 302.

[4] SARASIN, *Die Weddas von Ceylon*, I, 459.

of Ceylon, or the Niassers of Batu, where death alone is sufficient to dissolve the marriage bond.[1]

3. Between these extremes of one-sided freedom and entire prohibition of divorce various intermediate phases appear. Sometimes the only method is mutual agreement of the parties. So, for instance, according to Post, among the Karo-Karo, a Batak tribe on the east coast of Sumatra, neither harsh mistreatment, wicked desertion, nor even adultery gives either the wife or the husband singly the right to demand a separation. Only in case of life-assault is one-sided divorce permitted; and this rule is perhaps a mitigation of the older and severer law.[2] In West-Victoria "a man can divorce his wife for serious misconduct, and even put her to death; but in every case the charge against her must first be laid before the chiefs of his own and his wife's tribes, and their consent to her punishment obtained. If the wife has children, however, she cannot be divorced. Should a betrothed woman be found after marriage to have been unfaithful, her husband must divorce her. Her relations then remove her and her child to her own tribe, and compel the father of the child to marry her, unless he be a relative. In that case she must remain unmarried. If a husband is unfaithful, his wife cannot divorce him. She may make a complaint to the chief, who can punish the man by sending him away for two or three moons; and the guilty woman is very severely punished by her relatives." But there are other ways of dissolving a marriage; and under some conditions the woman has a chance. Exchange of wives, when

[1] POST, *Familienrecht*, 251, 252, following the researches of Wilken and Riedel. This rule applies, apparently, only to the Papuas of Geelvinkbai in New Guinea; elsewhere in that island the man may put away the woman at pleasure: KOHLER, "Ueber das Recht der Papuas auf Neu-Guinea," in *ZVR.*, VII, 373. In general *cf.* WESTERMARCK, *op. cit.*, 517.

[2] POST, *op. cit.*, 252. In some instances, however, mutual agreement is only one of several grounds on which dissolution of the marriage is allowed. "So ist z. B. auf Mukuhiva, auf den Marianen, bei den Koluschen eine Trennung der Ehe durch gegenseitige Uebereinkunft gestattet. Ebenso in Birma."—POST, *loc. cit.*, 252, 253.

both are childless, is "permitted only after the death of their parents, and, of course, with the consent of the chiefs." A couple without children may separate by mutual consent; and "when a woman is treated with cruelty by her husband, she may put herself under the protection of another man, with the intention of becoming his wife. If he take upon himself the duty of protecting her, he must challenge her husband and defeat him in single combat in presence of the chiefs and friends of both parties." When a "husband knows that his wife is in love with another man, and if he has no objection to part with her, he takes her basket to the man's wuurn and leaves it. But as no marriage or exchange of wives can take place without the consent of the chief, the wife remains with her husband till the final great meeting, when the bargain is confirmed. This amicable separation does not create any ill feeling between the parties, as the woman is always kind to her first husband without causing any jealousy on the part of the second. Such transactions, although lawful, may not be approved of by the woman's relatives, and she is liable to be speared by her brother."[1]

Among the Marea, when husband and wife can no longer tolerate each other, they are given a year's probation by the "family council;" and only after the expiration of this period does the formal divorce take place. A discontented Marea dame of noble (patriarchal) rank may not of her own will leave her husband; for this would offend social usage. But a Tigrait, or woman of the servile class, may under such circumstances abandon her spouse, provided thenceforth she live abroad.[2]

[1] DAWSON, *Australian Aborigines*, 33-36. Divorce by mutual consent is lawful in Polynesia, but it rarely occurs if there are children: AVERY, "The Indo-Pacific Oceans," *Am. Ant.*, VI, 366; the same is true of some American peoples: WAITZ, *Anthropologie*, III, 328.

[2] MUNZINGER, *Ostaf. Studien*, 241.

4. Again it is very common among uncivilized as well as more advanced races for a man to have absolute right of divorce, putting away his wife when he likes, without the assignment of any reason, or on the most frivolous grounds.[1] Sometimes, even among the same peoples, the woman has a reciprocal right, as will presently appear; but very often divorce is the sole prerogative of the man, or else the woman is grudgingly allowed the privilege only for the most serious cause. The unfavorable position in which she is thus placed is no doubt largely due to wife-capture, and especially to wife-purchase, through which she too often sinks to the level of a mere chattel or beast of burden. Still even wife-purchase, as hereafter shown, may have its compensations; for the husband cannot act too harshly without danger of the blood-feud; and he may suffer a decided disadvantage with respect to property by summarily dismissing his wife. Unlimited right of divorce belongs to the man in some parts of China,[2] and with many African[3] and American[4] tribes. "The Aleuts used to exchange their wives for food and clothes. In Tonga a husband divorces his wife by simply telling her to go." In "Yucatan a man might divorce his wife for the merest trifle, even though he had children by her."[5] Among the California Yurok "divorce is very easily accomplished at the will of the husband, the only indispensable formality being that he must receive back from his father-in-law the money which he paid for

[1] For these cases see WESTERMARCK, *op. cit.*, 520–23; POST, *Familienrecht*, 253, 254; *idem*, *Afrikanische Jurisprudenz*, I, 433–36; *idem*, *Grundlagen*, 268, 269; FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 251, 252; KOHLER, "Studien," *ibid.*, V, 340, 341 (Mongols and Tunguse); *idem*, "Ueber das Recht der Koreaner," *ibid.*, VI, 403; and LETOURNEAU, *L'évolution du mariage*, 286 ff., 289 ff.

[2] MCLENNAN, *Studies*, I, 141, 142, note; POST, *Familienrecht*, 253. But this is not the general rule, as below shown.

[3] POST, *Afrikanische Jurisprudenz*, I, 433 ff.; WAITZ, *Anthropologie*, II, 109, 115 (only the woman legally capable of adultery), 120; MUNZINGER, *Ostaf. Studien*, 320 (Beni Amer).

[4] POST, *Familienrecht*, 253.

[5] WESTERMARCK, *op. cit.*, 520, 521.

his spouse."[1] If dissatisfied with his wife, the young Gallinomero of the same region may "strike a bargain with another man" and sell her "for a few strings of shell-money."[2] In the so-called "straw dance" the Dakota husband may "throw away" the wife whom he no longer desires. He may even take several wives in order to dispose of them in this way; thus adding to his importance and giving evidence of his "strong heart."[3] Among the Abipones divorces are as frequent "as changing of the dress in Europe." If "their wives displease them, it is sufficient; they are ordered to decamp." The husband's right is unrestrained by the law; but, "appointing a drinking-party, wherein the memory of injuries is refreshed in the minds of the intoxicated guests, the relations fiercely avenge the dishonor done to the repudiated wife."[4] The Tasmanian husband, when dissatisfied or when a liberal offer is made, may "transfer" his spouse like a slave; but in Luzon a divorce is more difficult, for the wedding gifts must be redistributed among the donors.[5] With "the ancient Hebrews, Greeks, Romans, and Germans, dislike was regarded as a sufficient reason for divorce."[6] Such is also

[1] POWERS, *Tribes of Cal.*, 56. [2] *Ibid.*, 178.

[3] After the wife is "thrown away" the husband becomes a "young man" again, and seeks new partners: BECKWITH, "Customs of the Dakotahs," *Rep. Smith. Inst.*, 1886, Part I, 256. *Cf.* also on the man's absolute right of divorce, DORSEY, "Siouan Sociology," *XV. Rep. of Bureau of Eth.*, 225.

[4] DOBRIZHOFFER, *Account*, II, 210-12, 96, 138; *cf.* GUIMARÃES, "Memoria," *Revist. Trim. Hist.*, VI, 307.

[5] BONWICK, *Daily Life and Origin of the Tasmanians*, 73, 74. The Tasmanian woman, he adds, even when divorced "was by no means free, as the tribe exercised jurisdiction" in her "affairs and the disposal of her person. She soon came under bondage again to another man, though perhaps to a younger than her first affianced one; as the young fellows were in most instances supplied with their first partners from the overflowing establishments of their seniors, or by the grant of a cast-off bit of property."

[6] WESTERMARCK, *op. cit.*, 520, 521, citing Deut. 24:1; MEIER AND SCHÖMANN, *Der attische Process*, 511; MCKENZIE, *Studies in Roman Law*, 123 ff.; GRIMM, *Rechtsalterthümer*, 454. On the Hebrews see also LETOURNEAU, *op. cit.*, 302, 303; GLASSON, *Le mariage civil et le divorce*, 145 ff.

the case on the island of Nias;[1] while among the Galela and Tobelorese the man may put away his wife on account of laziness; and elsewhere he may do the same because she is tiresome or because she lacks skill for household service.[2]

Under the existing law of Islâm the woman has gained a limited right of divorce. By the form called *chol* she may buy her release; and in this case "a restoration of the marriage bond is impossible." Again, for certain specified faults of the husband, she is granted a separation through *fasch*, or judicial decree.[3] On the other hand, by *li'an*, or solemn oath before the *cadi*, a husband is able to put away the spouse whom he believes to be unfaithful;[4] but in general the right of the man to reject the woman without assigning any cause whatever is absolutely unrestrained. The great majority of divorces among Moslem peoples take the form of *talâq*, or repudiation. It is only necessary for the husband who is tired of his wife to say to her "*mutállaka*," "Thou art dismissed."[5] In harmony with the old Arabian custom the procedure by *talâq* may consist of a

[1] POST, *Familienrecht*, 253, 254; RIEDEL, in *ZFE.*, XVII, 78.

[2] "In den Gallareichen kann der Mann die Frau verstossen, weil sie ihm langweilig geworden oder zu den häuslichen Geschäften nicht tauglich ist. Will er dagegen keine Scheidung, sondern nur Trennung, so ergiebt sich die Frau der Prostitution und kann vom Gatten für sich und ihre illegitimen Kinder Wohnung und die nöthigen Nahrungsmittel beanspruchen."—POST, *Familienrecht*, 253, 254. In New Caledonia, likewise, the wife may be put away because she bores her husband: LETOURNEAU, *op. cit.*, 285.

[3] The wife is entitled to a divorce in this way when the husband (1) leaves her without support; (2) accuses her falsely of unfaithfulness; (3) refuses to acknowledge the child which she has borne him; (4) when he abandons the faith; or (5) fails in "marital duty": HELLWALD, *Die mensch. Familie*, 409. But in practice little use is made of this form, the woman preferring instead to declare before the judge that she is in a condition of matrimonial "insurrection," by which means the husband is usually led to "repudiate" her: *idem*, *loc. cit.*

[4] The procedure by oath is allowed when the husband is persuaded, but cannot prove, that the wife is pregnant by another man; and the action must precede the *accouchement*. The wife may take a similar oath that the husband's belief is unfounded: HELLWALD, *op. cit.*, 409.

[5] But other phrases, such as "Cover thee with thy veil," or "Seek another man," may be employed: HELLWALD, *op. cit.*, 409. Compare the three formulæ used in Algiers: LETOURNEAU, *op. cit.*, 297.

"triple declaration" or three successive divorces. After the first pronouncement of the formula the repudiated woman remains three months in her harem at the man's cost, and he is at liberty to take her back if he will. Indeed, a single tender glance or word of concession is sufficient to restore the marriage. Should he not reclaim her until the specified term is passed, he may then do so only in case she has not already taken a new husband, and by paying her a "second time the full amount of the morning-gift as stipulated at their marriage." A second or even a third separation from the same wife may be had by repetition of this process; but the third declaration, unlike the other two, is irrevocable, definitively dissolving the marriage bond.[1]

Among a great many peoples, even those comparatively little advanced in general culture, the husband is permitted to divorce his wife only for definite reasons.[2] The causes of legal divorce most constantly recurring are adultery and sterility. In a great many cases divorce is absolutely forbidden after a child, usually a son, is born. It should be carefully noted that many of the alleged examples of divorce on the ground of sterility are, strictly speaking, not divorces at all; but rather illustrations of the so-called "proof-marriages" so often met with in all parts of the world. Not until the term of probation is "blessed" by the arrival of offspring is the "marriage" in such cases regarded as complete, though this may not always be the implied condition. With the proof-marriages are sometimes described as iden-

[1] HELLWALD, *op. cit.*, 410, 411; following especially VINCENTI, *Die Ehe im Islâm*, 22, 23. After the third divorce or declaration there is still a way in which the man can get his wife back when she, in due legal form, has married another man, and has been repudiated by him. This procedure is usually collusive by means of a "straw husband": HELLWALD, *loc. cit.*, citing EFENDI, *Türkische Skizzen*, II, 15. In general see UNGER, *Die Ehe*, 48–50; LETOURNEAU, *op. cit.*, 289–99, on the triple declaration among Mohammedan peoples of Africa.

[2] These cases are discussed by POST, *Familienrecht*, 253–55; *idem*, *Grundlagen*, 269; *idem*, *Afrikanische Jurisprudenz*, I, 439–41; LETOURNEAU, *op. cit.*, 286 ff.; WESTERMARCK, *op. cit.*, 523, 524; FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 251.

tical in character the "time-marriages" found among many peoples; but this form of union is, properly speaking, usually a real marriage not dependent for its consummation upon the birth of a child, being stipulated in advance for a certain term.[1] Besides the two leading grounds of divorce already mentioned, many others, some of them trivial, are prescribed by the laws of various peoples. Such are mistreatment, deformity, laziness, desertion, and incompatibility of temper. Sometimes the consent of the chief or other public authority is requisite. So, among the Hottentots, a man may divorce his wife only "upon shewing such cause as shall be satisfactory to the men of the kraal where they live;"[2] and among the aborigines of Victoria, as already seen, a childless wife may be dismissed for serious misconduct only when the sanction of the tribal chief is obtained.[3] By Chinese law divorce *must* be granted in case of any of the numerous impediments[4] to marriage; or when the wife is guilty of adultery. For that offense the aggrieved husband may kill the offending wife and her paramour, if he

[1] On these so-called "Zeitehen" and "Ehen auf Proben," in addition to the references, chap. ii, p. 49, note 2, see POST, *Familienrecht*, 75–79; *idem*, *Afrikanische Jurisprudenz*, I, 321–23; STARCKE, *Primitive Family*, 258–60; WESTERMARCK, *op. cit.*, 523, 524, who apparently includes these cases under the head of divorce for sterility. "Proof-marriages" are said even now to be customary in Yorkshire: BUNSEN, in *ZFE.*, XIX, 376; POST, *op. cit.*, 77; and a good example is afforded by the Scotch "hand-fasting" prevalent in the eighteenth century: "Two chiefs agreed that the heir of the one should live with the daughter of the other as her husband for a year and a day; if at the end of that time the woman had become a mother, or, at any rate, if she was pregnant, the marriage was regarded as valid, even if unblest by a priest;" otherwise the connection was dissolved: STARCKE, *op. cit.*, 260; SKENE, *The Highlanders of Scotland* (London, 1837), 166. *Cf.* TEGG, *The Knot Tied*, 222, 223; BRAND, *Popular Antiquities*, II, 87, 88; BULLINGER, *The Christen State of Matrimonye* (1541), 48, 49; WOOD, *The Wedding Day*, 113, 184, 185; STILES, *Bundling*, 17, 19. For examples of temporary unions among the American Indians see WESTERMARCK, *op. cit.*, 518, 519. Such marriages are found among the Winnebagoes: THWAITES, in *Wis. Hist. Coll.*, XII, 427.

[2] WESTERMARCK, *op. cit.*, 524: *ap.* KOLBEN, *The Present State of the Cape of Good-Hope* (London, 1731), I, 157. However, this rule may in practice have little meaning: see POST, *Afrikanische Jurisprudenz*, I, 435, who also cites Kolben.

[3] DAWSON, *Australian Aborigines*, 33.

[4] For the impediments to matrimony, all of which are diriment, see MÖLLENDORFF, *Das chin. Familienrecht*, 9–20.

catch them *in flagrante delicto.* But should the woman not be slain, she is punished, and the husband may drive her away or even sell her as a concubine, provided he has not pandered to the crime or does not sell her to the guilty man.[1] Furthermore, a marriage may be dissolved by mutual agreement;[2] and the husband is entitled to a divorce when the wife strikes him, is addicted to drunkenness or opium smoking, has been defiled before marriage, or when she leaves his house against his will.[3] Besides all these grounds, established by statute or recent usage, Confucius allows the husband a divorce for any of seven faults of the wife: barrenness, wantonness, inattention to parents-in-law, talkativeness, theft, jealousy, and inveterate disease such as leprosy.[4] But these grounds will not always warrant a separation. "They may be outweighed by particular merits of the woman

[1] MÖLLENDORFF, *Das chin. Familienrecht*, 32. In China a man is legally incapable of adultery. If the husband slay either the man or the woman taken *in flagrante delicto*, he must do so on the instant; "though it is also allowable for the husband to kill the adulterer outside the house, if it be in chase. But if the husband first ties up the adulterer, and then kills him, he will be guilty of a transportable offence. . . . . If the husband kills the wife afterwards, he will be liable to three years' transportation and 100 blows."—ALABASTER, *Chinese Criminal Law*, 187, 188. If the paramour kills the husband, the wife is strangled, whether she knew of the crime or not, provided the husband has not consented to the adultery. Grace is shown the woman only "when the murder was sudden and unpremeditated;" but then only in case that she "fly to the rescue, and give the alarm, and do her best to bring the murderer to justice by denouncing him to the authorities."—ALABASTER, *op. cit.*, 194. The price of the guilty wife sold as a concubine falls to the state: MÖLLENDORFF, 32.

[2] The agreement, however, must be in good faith. Should the wife plan the divorce so as to form a punishable relation with another man, it is void, and the husband may retain the woman or sell her to another as in the case of unfaithfulness: KOHLER, "Aus dem chin. Civilrecht," *ZVR.*, VI, 376.

[3] MÖLLENDORFF, *op. cit.*, 32; HELLWALD, *op. cit.*, 380, 381; ALABASTER, *op. cit.*, 182 ff.; GROSSE, *Die Formen der Familie*, 225 ff.; KATSCHER, *Bilder aus dem chin. Leben*, 90 ff., *passim.*

[4] If he puts away his wife without just cause, he is to receive eighty blows with the bamboo and take her back: WAKE, *Marriage and Kinship*, 232; KOHLER, *loc. cit.*, 375; WESTERMARCK, *op. cit.*, 523; LETOURNEAU, *op. cit.*, 300, 301; DOOLITTLE, *Social Life of the Chinese*, I, 106, 107.

According to TSCHENG-KI-TONG, *China und die Chinesen*, 55, barrenness is the only serious ground of divorce in China, and even of this little use is made, particularly by the aristocracy; but this view is not sustained by other evidence, divorce being frequent among the lower classes: HELLWALD, *op. cit.*, 380, 381.

or by special circumstances. If the wife has mourned three years for the husband's parents; if the family has grown rich during the marriage; or if the wife has no longer relatives to receive her, then the seven assigned grounds fail, the divorce is not only forbidden but void, and the husband must retain his wife."[1] This is not the only wise and righteous provision of the Chinese law, however despotic as a rule may be the husband's power. Normally the wife cannot sue for divorce; still practically she enjoys the right of separation in several important contingencies. Under judicial approval, for instance, she may release herself from the marriage bond in case of three[2] years' desertion without word from her husband. So likewise, when she suffers grave insult from the husband's parents, she may return to her own family, reclaim her dotal gift, and demand a contribution for her support.[3]

In modern Japan divorce is regulated according to the principles of western law; but formerly the husband's power was governed, as in China, by the rules of Confucius.[4] Furthermore, in spirit the Aztec law of divorce bears a

[1] KOHLER, *loc. cit.* On the other hand, the interpretation of these rules may often be "too elastic" in favor of the man. In one of the old Chinese books, according to WESTERMARCK, *op. cit.*, 524, 525, "when a woman has any quality that is not good, it is but just and reasonable to turn her out of doors. . . . . Among the ancients a wife was turned away if she allowed the house to be full of smoke, or if she frightened the dog with her disagreeable noise": citing NAVARETTE, *An Account of the Empire of China* (London, 1704), 73.

[2] According to ALABASTER, *op. cit.*, 190, "it would seem that the husband can claim no marital rights, if he has been for five years in exile, without writing to his family, and his wife has in the meantime married again, although the law is not clear."

[3] KOHLER, *loc. cit.*, 375, 376. The woman has also the right of divorce when the husband is a leper or becomes such after marriage; when he is impotent; and either party may claim the right when deceived by a false allegation in the marriage contract: MÖLLENDOEFF, *op. cit.*, 32, 33; ALABASTER, *op. cit.*, 182.

See further on Chinese divorce and marriage, LEGGE, *Life and Teachings of Confucius*, 106, *passim;* HUC, *Chinese Empire*, II, 218–20, 262, 263; WAKE, *Marriage and Kinship*, 229–35.

[4] KOHLER, "Studien aus dem japanischen Recht," *ZVR.*, X, 449. *Cf.* WAKE, *op. cit.*, 233, note; WESTERMARCK, *op. cit.*, 525: HELLWALD, *Die mensch. Familie*, 383–86; GROSSE, *Die Formen der Familie*, 228–31.

striking resemblance to that of China. Only in special cases, not now understood, had the woman a right of separation; and the husband could put away his wife only for definite reasons, such as sterility and certain defects of character, as when she proved herself careless, impatient, lazy, or quarrelsome. Divorce, however, was discouraged; and even when a legal reason was alleged, it could not be effected without a judicial decree. The decree did not declare the separation; it merely allowed the plaintiff in the matter "to do what he should find good." Thus permission was given for divorce; but the judge avoided pronouncing the separation in direct words.[1]

5. Finally, in further illustration of the endless variety of popular customs, it must be noted that among many peoples the wife also has the right of divorce. Often, as already seen, she may leave her husband at pleasure or on the slightest pretext. It needs but a glance at the usages of the American Indians in this regard to perceive that the lot of the married woman among barbarous or even savage tribes is not always so dark as it is frequently painted;[2] and many similar proofs elsewhere exist.[3] Among the inland Columbians, according to Bancroft, "either party may dissolve the marriage at will."[4] A similar rule prevails with

[1] KOHLER, "Das Recht der Azteken," *ZVR.*, XI, 60; KLEMM, *Kulturgeschichte*, V, 35. Among the Aztec Otomis the parties could separate after the first night; but, possibly, this is a case of proof-marriage; and in Michoacan the same rule prevailed, if they swore that they had not "seen one another": KOHLER, *loc. cit.*, 61. The divorce laws of the Chins or Khyengs, in farther India, are particularly interesting; and in some respects they are similar in principle to those of the Chinese and Aztecs: KOHLER, "Das Recht der Chins," *ZVR.*, VI, 186 ff., 191 ff.

[2] *Cf.* SPENCER, *Principles of Sociology*, I, 722, 723; MASON, *Woman's Share in Primitive Culture*, 229, for suggestive remarks in this connection. WESTERMARCK, *op. cit.*, 526–29, discusses this topic with characteristic minuteness, giving in a note a list of peoples, with authorities, among whom the wife has the right of divorce absolutely or on conditions.

[3] So in Tahiti, the Sandwich Islands, the Marianne and Caroline groups, the Indian Archipelago, in Africa, and elsewhere; see the examples of free divorce at the option of either party and the authorities already mentioned above. *Cf.* LETOURNEAU, *op. cit.*, 287.

[4] BANCROFT, *Native Races*, I, 277.

the Moxos of South America, the tribes of California, as well as among the Iroquois and their neighbors.[1] "If a Bonak wife gets up and leaves the man, he has no claim ever after on her;"[2] and, according to Schoolcraft, when the Navajo woman marries, "she becomes free, and may leave her husband for sufficient cause."[3] The Guanan[4] and Guatemalan[5] wife is equally privileged; and the Sioux and other Dakota women are often notoriously independent, even beating their husbands for unfaithfulness, and for this or other just cause returning to their own kindred.[6] Sometimes the wife has the right of divorce only on definite grounds, which may differ from or be the same as those permitted to the husband.[7] Often the reasons which satisfy the moral sense of the community are very slight; at other times they are grave and few in number. Among the Shans, "should the husband take to drinking or otherwise misconducting himself, the woman has the right to turn him adrift, and to retain all the goods and money of the partnership."[8] In "Eastern Central Africa divorce may be effected if the husband neglects to sew his wife's clothes, or if the partners do not please each other.[9] Theoretically among the Athenians the woman could demand a divorce for mistreatment, "in which case she had merely to announce

[1] *Ibid.*, 412; MORGAN, *Ancient Society*, 454 (Iroquois); LETOURNEAU, *op. cit.*, 288.

[2] WESTERMARCK, *op. cit.*, 527: *ap.* SCHOOLCRAFT, *Indian Tribes*, IV, 223 ff.

[3] WESTERMARCK, *op. cit.*, 527: *ap.* SCHOOLCRAFT, *Indian Tribes*, IV, 214. But it appears to be a point of honor for the abandoned husband to avenge himself by killing someone: BANCROFT, *op. cit.*, I, 512; LETOURNEAU, *op. cit.*, 288.

[4] WESTERMARCK, *op. cit.*, 527.

[5] BANCROFT, *op. cit.*, II, 672; LETOURNEAU, *op. cit.*, 288.

[6] So among the Santals (Dakotas): LETOURNEAU, *loc. cit.*

[7] For this class of peoples see POST, *Familienrecht*, 250, 254–58; *idem*, *Afrikanische Jurisprudenz*, I, 436–39; WESTERMARCK, *op. cit.*, 526–29.

[8] WESTERMARCK, *op. cit.*, 527, 528: *ap.* COLQUHOUN, *Amongst the Shans*, 295.

[9] WESTERMARCK, *op. cit.*, 528: *ap.* MACDONALD, *Africana*, I, 140.

her wish to the archons;"[1] while the Kafir wife "who is beaten or not provided with sufficient food and clothes is entitled to return to her parents."[2] In fact, the right of the woman to repudiate her husband for mistreatment is alleged to be the general rule according to negro custom.[3] Even by modern Mohammedan legislation "divorce may, in certain cases, take place at the instance of the wife, and, if cruelly treated or neglected by her husband, she has the right of demanding divorce by authority of justice."[4]

II. THE FORM OF DIVORCE

The form of divorce, like the rules relating to the right and its conditions, varies greatly among the races of mankind. Very frequently, usually among the lowest peoples, it takes place without any ceremony.[5] Sometimes, however, the procedure is fixed by law or custom. A symbolical act is occasionally sufficient, as with the east African Wazaramo,

[1] WESTERMARCK, *op. cit.*, 528, 529; GLASSON, *Le mariage civil et le divorce*, 152 ff.; UNGER, *Die Ehe*, 60; PLUTARCH'S *Lives* (London, 1890), Solon, 68. Primitively the Grecian wife had little liberty in this regard; even later it was always difficult to enforce her right of divorce; and repudiation was regarded as a disgrace: LECKY, *History of European Morals*, II, 287, 289; LETOURNEAU, *op. cit.*, 304.

[2] WESTERMARCK, *op. cit.*, 528, 529; WAITZ, *Anthropologie*, II, 389; POST, *Afrikanische Jurisprudenz*, I, 436. But in case of the Kafirs, the chief decides whether the woman has just cause: POST, *op. cit.*, 438.

[3] "Wird die Frau misshandelt oder vernachlässigt, so kann sie die Lösung der Ehe verlangen; dies ist allgemeines Negerrecht."—KOHLER, "Ueber das Negerrecht, namentlich in Kamerun," *ZVR.*, XI, 441, 442. See also HENRICI, "Das Recht der Epheneger," *ibid.*, 135; BASTIAN, *Rechtsverhältnisse*, 179 (Gold Coast).

[4] WESTERMARCK, *op. cit.*, 528, 529: *ap.* AMÍR' ALÍ, *Personal Law of the Mahommedans* (London, 1880), chaps. xii ff.

"According to the Talmudic Law, the wife is authorized to demand a divorce if the husband refuses to perform his conjugal duty, if he continues to lead a disorderly life after marriage, if he proves impotent during ten years, if he suffers from an insupportable disease, or if he leaves the country forever."—WESTERMARCK, 528; GLASSON, *op. cit.*, 149 ff. Consult also AMRAM, *The Jewish Law of Divorce*, 63–77, who gives an interesting discussion of the woman's power of divorce; and, besides the causes just named, mentions also "refusal to support," "apostasy," "wife-beating," when the wife is not at fault, and "false charge of ante-nuptial incontinence." *Cf.* LETOURNEAU, *op. cit.*, 303.

[5] For examples see POST, *Familienrecht*, 258; *idem*, *Afrikanische Jurisprudenz*, I, 452.

where the husband by way of divorce hands the wife a piece of holcus reed, on receiving which she must at once leave the house or be driven out.[1] The Unyoro husband observes a similar rite.[2] It is likewise a private transaction in Morocco, where the man rejects the woman by a bill of divorce. The same procedure may be employed in China; and a three-fold proclamation before witnesses is adequate among the Somali.[3] In Dawan (west Timor) it takes place in a council composed of the relations of the man and wife, where the cause is weighed and determined; but in this assembly neither the chiefs nor the eldest have any voice.[4] Similar councils are common among African tribes.[5] In many instances, however, exactly the opposite rule prevails, the decision of the "eldest," the "chiefs," or of some other magisterial, priestly, or judicial authority being requisite for a legal separation.[6]

III. THE LEGAL EFFECTS OF DIVORCE

Not less diversified are the customs governing the effects of divorce; and here, as in the case of its varying forms and conditions, one is almost as often surprised by the reasonableness and stability of early institutions as he is shocked at their harshness or injustice when regarded from the civilized standpoint. In the disposal of the children the existing system of kinship is very widely determinative. Among a great many peoples, in case of separation, the children follow the father or the mother according as mother-right or

[1] *Ibid.*, I, 452.

[2] Here the man divorces his wife by cutting in two a piece of "Rindenstoff, von dem er eine Hälfte behält und eine Hälfte dem Vater der Frau zuschickt."—POST, *loc. cit.*

[3] MÖLLENDORFF, *Das chin. Familienrecht*, 33; POST, *op. cit.*, I, 452.

[4] POST, *Familienrecht*, 259.

[5] POST, *Afrikanische Jurisprudenz*, I, 453.

[6] In the Indian Archipelago a priest is necessary, for instance, on the islands of Gorong and Seranglao; among the Buginese; as also with the Makassars, where he receives 3 gulden for his trouble: POST, *Familienrecht*, 259, 260.

father-right prevails;[1] and where a mixed system, or rather a coincidence of mother-right and paternal authority,[2] is found, or else relationship is cognatic, they are divided between the parents or their kindred.[3] The division is determined by a variety of rules among different peoples. Often they are equally divided, regardless of sex.[4] Sometimes, as in Bulgaria,[5] Burma,[6] and among the Natchez Indians,[7] the daughters follow the mother and the sons remain with the father. In still other cases, as in certain South Slavonian districts, the father takes the adult children, while those of tender years are left in the mother's hands. Such is the rule in Zara and in Bosnia.[8] In Lika, according to Krauss, when all the children are males, the mother receives the minors, if the father consents; but when they are of both sexes, the sons follow the father and the daughters the mother. In this last case, however, the man is required to pay the divorced woman whatever is needed to supply the bridal outfit of the daughters when they reach marriage-

[1] So in case of divorce among the Omahas, where, as DORSEY believes, "father-right has succeeded mother-right," the woman cannot take the children with her if the man is unwilling; although in practice they "are sometimes taken by their mother, and sometimes by her mother or their father's mother."—"Omaha Sociology," *III. Rep. of Bureau of Eth.*, 225, 262.

In China a divorce completely dissolves the marriage; the woman returns to her family, if it will receive her; the children remain with the father; and the purchase price is returned to him, unless his conduct has caused the divorce. When her family declines to receive the woman she becomes *sui juris:* MÖLLENDORFF, *Das chin. Familienrecht*, 34.

[2] See chap. i, 21 ff., above.

[3] POST, *Familienrecht*, 260–62; *idem*, *Afrikanische Jurisprudenz*, I, 447, 448; *idem*, *Grundlagen*, 276, 277.

[4] So in the Malay Rawas, where kinship is cognatic. Here, in case of an odd number, the undivided child is left temporarily with the mother, but the father has the right on the payment of the equivalent of 8 reichsthaler to claim the child when it no longer needs the mother's care: POST, *Familienrecht*, 261, 262.

[5] KRAUSS, *Sitte und Brauch der Südslaven*, 297.

[6] When the divorce is by common consent: KOHLER, in *ZVR.*, VI, 172; POST, *Familienrecht*, 262. For African examples see POST, *Afrikanische Jurisprudenz*, I, 449.

[7] PRATZ, *Hist. de la Louisiane*, II, 387.

[8] KRAUSS, *Sitte und Brauch der Südslaven*, 295, 296.

able age. When it happens at the time of separation that all the children are grown-up daughters, they are allowed a free choice between the parents. Should none remain with the father, the mother and daughters are entitled to all the property gained during marriage.[1] Often in case of divorce the children belong to the innocent party;[2] unless children are regarded as a burden, when the opposite rule prevails;[3] or unless the system of kinship determines the disposition of the offspring, when an equitable adjustment is otherwise made. Thus among the African Fantis of the Gold Coast —where by law the children belong to the mother's family —in case of divorce through fault of the woman, the man is entitled to a sum equal to 22s. 6d. for each child; and when by stipulation the sons remain with the father, he is nevertheless not permitted to sell them or put them in pawn. If the divorced wife cannot restore to the husband the price paid for her, the children are left with him as a pledge for the debt until by their service they have paid it with 50 per cent. interest. In this way, we are told, children often become slaves for life to their own father and as such are even transmitted to his heirs.[4]

Very similar in variety and character are the rules governing the disposition of the property when a marriage is dissolved. These are mainly dependent in each case upon the general principles of the family law relating to property rights.[5] Sometimes, as among the South Slavonians,[6] each

[1] *Ibid.*, 295. Sometimes all the children go to the father or to the house-community, the mother receiving back the dotal gift: *ibid.*, 296, 297.

[2] POST, *Grundlagen*, 277; *idem*, *Afrikanische Jurisprudenz*, I, 448 ff.; *idem*, *Familienrecht*, 262, 263.

[3] Thus in Morocco the husband who puts away his wife must keep the children; POST, *Afrikanische Jurisprudenz*, I, 449.

[4] *Ibid.*, I, 448. *Cf.* LETOURNEAU, *L'évolution du mariage*, 286.

[5] POST, *Grundlagen*, 276.

[6] So in Lika. In Stara Pazva the woman receives back her dotal portion; and in Strošinci common gains are divided: KRAUSS, *op. cit.*, 295, 296; POST, *Familienrecht*, 316.

receives back the property which he had at the time of the marriage, while the common earnings are divided, though not always in equal portions.[1] But as the most general rule responsibility for the divorce is of vital importance in determining the course to be pursued. The man or the woman who arbitrarily dissolves the marriage, or whose guilty conduct is the cause of separation, usually suffers a decided disadvantage. Thus the woman must restore the dotal gift or the presents received from her husband; and the purchase price must be repaid by herself or by her kindred. On the other hand, the man who puts away his wife without just cause must often forfeit all claim to restitution of the bride-money, perhaps lose his children, and even suffer other penalties besides, such as the payment of alimony.[2]

Especially interesting among uncivilized or backward races are the effects of divorce with respect to second marriage or the remarriage of the parties to one another. Everywhere, apparently, the man who puts away his wife or has been divorced by her is allowed to contract a second marriage immediately, or, at any rate, after a very short interval.[3] This follows almost as a matter of course where

[1] In the archipelago of Seranglao and Gorong the lands and houses which each party had before the marriage are retained by each, and the winnings are divided, the man receiving two-thirds and the woman one-third: POST, *loc. cit.*

[2] HENRICI, "Das Recht der Epheneger," *ZVR.*, XI, 135 (alimony). For many examples of these rules see POST, *Familienrecht*, 316–20; *idem*, *Afrikanische Jurisprudenz*, I, 441–47. Thus in Morocco, should the husband put away his wife without cause, he must give her in presence of the judge a present (*etwas Beliebiges*) in value to suit himself; and a similar present is adequate for either party divorcing the other among the Moorish Braknas. In the East African city of Harar the husband responsible for the separation loses the purchase price, pays the woman a sum equal to it in value, and besides is obliged to support her outside of his dwelling during a term to be fixed by the *cadi:* POST, *Familienrecht*, 320; *idem*, *Afrikanische Jurisprudenz*, I, 443, 445. In the South Slavonian Bocca, Crnagora, and Herzegovina the husband who puts away his wife because she is affected by a disease is usually required to give her a lifelong support; and ordinarily, when he is accountable for the separation, he must pay a fine of from 50 to 100 thaler: KRAUSS, *op. cit.*, 567. For various illustrations see LETOURNEAU, *op. cit.*, 289 ff.

[3] Thus, among the Moors of Morocco, who almost all practice monogamy, the man who rejects his wife is not permitted to marry again within four months: POST, *Afrikanische Jurisprudenz*, I, 450.

wife-capture or wife-purchase exists, or where polygyny prevails.[1] But with regard to the second marriage of a divorced woman usage greatly varies. Among a number of peoples she is free to marry again, if she likes, even when she is responsible for the separation.[2] Generally, however, her freedom is restricted in this regard; and this is especially apt to be the case where wife-purchase exists; for then the legal rights of the husband in the woman are by no means extinguished by the dissolution of marriage. Her status as a wife must thus be distinguished from her position as property or as the object of contract. Accordingly for this or some other reason the woman who puts away her husband is sometimes absolutely forbidden to form a second marriage. Such is the case among peoples so little advanced as the Ashantees and Hottentots; while the Banjun wife who divorces her husband may not marry again in the same village where she found her first spouse.[3] Still more rigorous is the rule in Samoa, where the divorced woman is forbidden to remarry even after her husband's death.[4] Between the extremes of entire freedom and entire prohibition the remarriage of a woman is hampered by a variety of conditions, some simple and others severe. The Kafir woman may be married again by her father when she has divorced her husband with consent of the tribal chief. Sometimes the second marriage depends on the return of the marriage-gift or the purchase price; or the woman must wait a certain period, as three months or a year, before contracting it.[5] In

1 *Cf.* the suggestion of POST, *loc. cit.*

2 See the examples enumerated in POST, *Familienrecht*, 264; *idem*, *Afrikanische Jurisprudenz*, I, 453; among them are the people of Tonga, Tahiti, and Unyoro; also Dawan (West Timor) when the divorce is through the fault of the husband.

3 POST, *Afrikanische Jurisprudenz*, I, 450.

4 WAITZ-GERLAND, *Anthropologie*, VI, 129; POST, *Familienrecht*, 263.

5 Thus in the African Sarae the divorced woman must wait two months before remarriage: MUNZINGER, *Ostaf. Studien*, 387; among the Beni Amer, three months; while the Marea woman is obliged to refrain for a year: *ibid.*, 241, 321.

several instances, doubtless as the result of purchase, after returning to her father's house she remains at her husband's disposal until he formally sets her free; while in yet other cases she may be reclaimed by him within a certain definite time. So with the old Arabians the purchased wife was looked upon as the husband's property, and hence divorce did not release her from his claims.[1] In Islam, as already explained, where the ancient Arabian rule of triple declaration of divorce still survives, a man who has divorced his wife by a single or even a second declaration of the formula "can take her again within three months without asking her consent."[2] Among the Bedouins, in like spirit, when the divorce takes place at the instance of the woman, the man may refuse to repeat the formula of separation without which she cannot contract a second marriage.[3] Very frequently the second marriage, whether of a widow or a divorced woman, is not looked upon as so important as the first. The wedding ceremonial and festivities are less marked; the customary time of seclusion after the nuptials is shorter; the bride-price is much smaller; or the wife has a less advantageous position with respect to property.[4] On the other hand, the widow or divorced woman who will remarry has sometimes an important compensation for the loss of social prestige, since she may freely bestow her hand in choosing a second mate.[5]

[1] See especially on Arabian divorce, SMITH, *Kinship and Marriage*, 91 ff., who emphasizes the effect of wife-purchase. Compare POST, *Familienrecht*, 263. Among the Kabyles of Algiers for mistreatment the woman has the right of "insurrection;" she may return to her father's house; but without the consent of her husband she cannot remarry: LETOURNEAU, *L'évolution du mariage*, 295. *Cf.* HANOTEAU ET LETOURNEUX, *Kabylie*, II, 159, 164, 177 ff. The custom of insurrection appears to be general in Islam: HELLWALD, *Die mensch. Familie*, 409.

[2] SMITH, *op. cit.*, 93.

[3] KLEMM, *Kulturgeschichte*, IV, 151; POST, *Familienrecht*, 263, 264.

[4] See the interesting proofs for various African tribes in POST, *Afrikanische Jurisprudenz*, I, 454-57.

[5] *Ibid.*, 455. Sometimes, as among the equatorial tribes of West Africa, the widow shows a repugnance to second marriage: returning to her family, she never marries again: *ibid.*, 456.

Perhaps as a general rule the divorced man and woman are as free to remarry each other as they are to contract a second marriage with other persons;[1] but sometimes the reunion is dependent upon the observance of special legal formalities, or it can take place only after a fixed interval.[2] In rare instances, as among the ancient Aztecs, the remarriage of a divorced couple is absolutely forbidden.[3]

IV. FREQUENCY OF DIVORCE

The laws of divorce among backward races, it is thus perceived, are full of interest for the student of social institutions. One comes from the study with a clearer perception of the fact that such institutions are but the outward expression of human life — of slow experience and experimentation; and one gains a deeper respect for the concrete results of primitive culture. Especially important is the relation of divorce to the stability of society. The conservatism prevailing even among rude peoples with respect to the liberty of divorce is remarkable. This may be due in part to the fact that primarily marriage does not rest so much upon the sexual instinct as upon family needs.[4] In some instances, where dissolution of the marriage is free to either party, or where it is the peculiar right of the man, divorce is exceedingly rare.[5] The American Indian tribes are conspicuous in this regard.[6]

[1] POST, *Familienrecht*, 265; *idem*, *Afrikanische Jurisprudenz*, I, 453, 454.

[2] Thus in Dawan (West Timor), when peace is made between the divorced couple, the party who caused the separation must pay the parents of the other five swine and five pieces of linen. A year's interval must elapse with the African Peulhs of Futa-Jallon. In Unyoro (Africa) the reunion is celebrated by slaughtering a beef; and among the Berbers of Dongola the divorced man gives the woman two pieces of cotton stuff: POST, *Familienrecht*, 265; *idem*, *Afrikanische Jurisprudenz*, I, 453.

[3] KOHLER, "Das Recht der Azteken," *ZVR.*, XI, 61; *Cf.* also KLEMM, *Kulturgeschichte*, V, 35; POST, *Familienrecht*, 265.

[4] STARCKE, *Primitive Family*, 258, 259.

[5] For examples see FRIEDRICHS, "Familienstufen und Eheformen," *ZVR.*, X, 251, 252.

[6] Divorce is rare among the Muskogi and Natchez (Florida-Dakota), the Caribs, the aborigines of Paraguay and Nicaragua, and the Eskimo: FRIEDRICHS, *loc. cit.*; WESTERMARCK, *Human Marriage*, 524. *Cf.* POWERS, *Tribes of Cal.*, 239 (Wintun); DORSEY, *Siouan Sociology*, 243 (rare in the better class).

Sometimes there is a strong social sentiment against it. Such is the case in China. Formerly among the Japanese, like the ancient Aztecs, divorces were infrequent;[1] and among many less advanced peoples, such as the Afghans, the Veddahs, or even the Zulus, the sentiment of love is doubtless a stronger check upon instability of the family than is commonly supposed.[2]

The rules governing the division of property are important in this connection; for, as Westermarck suggests, the selfish interests of the husband "prevent him from recklessly repudiating his wife. In many instances divorce implies for the man a loss of fortune."[3] In rare cases he is obliged to provide for the wife's support even after the separation.[4] Often, as already seen, the woman receives back her dotal gift and whatever she brought with her at the marriage; while frequently the husband is obliged to surrender a portion or all of the common property. Thus "among the Karens, if a man leaves his wife, the rule is that the house and all the property belong to her, nothing being his but what he takes with him. Among the Manipuris, according to Colonel Dalton, a wife who is put away without fault on her part, takes all the personal property of the husband, except one drinking cup and the cloth round his loins;" and "similar rules prevail among the Galela, and in the Marianne Group."[5]

[1] For China see HELLWALD, *Die mensch. Familie*, 380, 381; TSCHENG-KI-TONG, *China und die Chinesen*, 55; WAKE, *Marriage and Kinship*, 232; DOOLITTLE, *Social Life of the Chinese*, I, 106, 107; MEDHURST, in *Trans. Royal As. Soc., China Branch*, IV, 27: WESTERMARCK, *op. cit.*, 525. For Japan see WAKE, *op. cit.*, 233; WESTERMARCK, *op. cit.*, 525; and for the Aztecs, BANCROFT, *Native Races*, II, 263-65; WAITZ, *Anthropologie*, IV, 132.

[2] *Cf.* the remarks of WAKE, *op. cit.*, 218; and compare RATZEL, *Hist. of Mankind*, II, 434 (Zulus); and SARASIN, *Die Weddas von Ceylon*, I, 458, 468, 469.

[3] WESTERMARCK, *op. cit.*, 531.

[4] WESTERMARCK, *op. cit.*, 19, gives examples.

[5] WESTERMARCK, *op. cit.*, 531, and the authorities cited in the notes. The same influence was a check upon divorce in Athens: LETOURNEAU, *op. cit.*, 304.

The conservative influence of property is even more marked in connection with wife-purchase—a powerful deterrent of hasty divorce. In the case of a sale-marriage, even in the weakened form of dower to the woman, the guilty or responsible party usually suffers a decided disadvantage from the separation. The man who repudiates his wife without just cause, as already shown, may not only forfeit his right to reclaim the bride-money, and incur other losses on the division of the property; but often, particularly where the maternal system of kinship prevails, he may have to surrender his children as well; and the woman who unjustly leaves her husband may lose all that she brought with her into the home or compel her kindred to restore the purchase price.[1]

Here also the results of the genealogical organization must be considered. The blood-feud, paradoxical as it may seem, often acts as a conservative power among primitive men. The wife's kindred may protect her from the vengeance of a brutal husband whom she has deserted; or they may send her back when she has acted indiscreetly or when they dread the wrath of the husband's clan. The organization of society on the basis of kinship has another important bearing upon the effects of divorce. It appears to be practically a universal rule among uncivilized races that the repudiated wife or the woman who legally puts away her

[1] On the conservative influence of wife-purchase see WESTERMARCK, *op. cit.*, 532, 535, 536; and for curious and instructive illustrations of the effects of purchase read especially the detailed account of the law of divorce among the Kabyles of Algiers in LETOURNEAU, *op. cit.*, 292-96. The man has the sole right of divorce. As a condition of setting the woman free he may demand the *lefdi*, or price of redemption, and fix such other terms as he pleases; as that the *lefdi* shall be double or triple, if she marry such or such a man. The sum may thus be so large as to amount to a prohibition of marriage. On the other hand, a liberal price may be an inducement to free the woman. Among some of these tribes the amount of the *lefdi* is fixed by law, usually at a sum higher than the *thâmanth*, or purchase price of a virgin or a widow, so as by working upon the cupidity of the husband to induce him to pronounce the triple formula and thus suffer the woman to contract a new marriage. The children under all circumstances follow the father.

husband shall return to her own family or clan, whose duty it is to receive her. Accordingly, the lot even of the savage woman has mitigating conditions not always accorded by the laws of civilized society. "In savages," observes Mason, "where every man and woman and child is billeted somewhere, there is no such thing as thrusting man or woman out into nowhere. . . . . Should the man wish to repudiate his wife, she cannot be sent out into the jungle or forest; she must be returned to somebody."[1]

[1] MASON, *Woman's Share in Primitive Culture*, 229, 230.

PART II

MATRIMONIAL INSTITUTIONS IN ENGLAND

CHAPTER VI

OLD ENGLISH WIFE-PURCHASE YIELDS TO FREE MARRIAGE

[Bibliographical Note VI.—The leading sources for this chapter are, of course, the ancient folk-laws, drawn up after the wandering and settlement of the Teutonic peoples. Of these the most complete and the most primitive are the old English "codes," in Schmid's *Die Gesetze der Angelsachsen* (Leipzig, 1858), until recently the best edition available; or in Thorpe's *Ancient Laws and Institutes of England* (8vo, 2 vols.; folio, 1 vol.; Record Commission, London, 1840), which, though not so well edited, has the advantage of an English version of the Anglo-Saxon texts. But Liebermann, in *Die Gesetze der Angelsachsen* (Halle, 1898–), is placing in the hands of scholars a more complete and a thoroughly critical edition which must supersede that of Schmid. For Germany the *Leges barbarorum* are contained in Walter's *Corpus juris germanici antiqui* (3 vols.; Berlin, 1824); and in the later and better editions of the *Monumenta germaniae historica*, particularly the *Leges burgundionum*, edited by L. R. De Salis (4to; Hanover, 1892); the *Leges alamannorum*, edited by Karl Lehmann (4to; Hanover, 1888); and the general collection of *Leges*, edited by G. N. Pertz, H. Brunner, R. Sohm, and Karl Zeumer (5 vols., folio; Hanover, 1835–89). These laws are conveniently grouped according to subject by Davoud-Oghlou, *Histoire de la législation des anciens Germains* (Berlin, 1845). Behrend, *Lex salica* (Berlin, 1874), has a good edition of the laws of the Salian Franks. There are some passages of fundamental interest, notably the celebrated c. 18, in Tacitus's *Germania*; and an interesting proof of the surviving symbols of wife-purchase may be found in Fredegarius, *Gregorii Turon. historia francorum epitomata* (Vol. IV of Guadet and Taranne's version of Gregory, 171–73, Paris, 1838; or in Vol. II of Giesebrecht's translation, 273–75, Leipzig, n. d.). An old English betrothal (*beweddung*) ritual of surpassing interest is preserved in the collections of Liebermann, Schmid, and Thorpe referred to; and the later development of the German betrothal ceremony is illustrated by the curious Swabian ritual of the twelfth century, first published by Massmann in *Rheinisches Museum für Jurisprudenz*, III (281 f.), as also in his *Fluchformularen* (179); and later in Friedberg's "Zur Geschichte der Eheschliessung," *ZKR.*, I, 369, 370; in the same author's *Eheschliessung* (26, 27); and in Sohm's *Eheschliessung* (319, 320).

The modern literature of early German and old English marriage is already very large. Among the more important writings of the eighteenth and early nineteenth centuries are Gundling, *De emptione uxorum, dote et morgengaba* (Leipzig, 1731); Ayrer, *Dissertatio de jure connubiorum apud veteres germanos* (Göttingen, 1738); Hofmann, *Handbuch des deutschen Eherechts* (Jena, 1789); Böhmer, *Ueber die Ehegesetze im Zeitalter Karl des Grossen und seiner nächsten Regierungsnachfolger* (Göttingen, 1826–27); Liebetrut, *Die Ehe nach ihrer geschichtlichen Entwickelung* (Berlin, 1834); Bosse, *Das Familienwesen, oder Forschungen über seine Natur, Geschichte und Rechtsverhältnisse* (1835); Richecour, *Essai sur l'histoire et la législation des formes requises pour la validité du mariage* (Paris, 1856); Smith, "De la famille chez les Burgondes," in *Mémoires lus à la Sorbonne* (1864); and Eckhardt, "Das Witthum oder Dotalitium und Vidualitium in ihrer historischen Entwickelung," in *Zeitschrift für deutsches Recht*, X (437 ff.). But in the literature of recent years of first-rate importance is Sohm's *Das Recht der Eheschliessung* (Weimar, 1875), perhaps the most acute and able monograph ever written on the subject; supplemented by his *Trauung und Verlobung* (Weimar, 1876). The best extended treatise on the history of the marriage form or contract is Friedberg's *Das Recht der Eheschliessung* (Leipzig, 1865). This was preceded by his "Zur Geschichte der Eheschliessung," in *ZKR.*, I, 362–91; III, 147–86 (Berlin and Tübingen, 1861–63); and followed, in his controversy with Sohm on the character of the betrothal, by his *Verlobung und Trauung* (Leipzig, 1876). The Theories of Sohm and others are examined by Habicht, *Altdeutsche Verlobung* (Jena, 1879); and, from the standpoint of northern custom, by Lehmann, *Verlobung und Hochzeit* (Munich, 1882); and Beauchet, *Mariage dans le droit islandais du moyen age* (Paris, 1887). In this connection may be read Schroeder, *Geschichte des ehelichen Güterrechts in Deutschland* (Stettin, 1863–74); his *Rechtsgeschichte* (2d ed., Leipzig, 1894); as also Brunner's very able *Rechtsgeschichte* (Leipzig, 1887); Ficker, *Untersuchungen zur Rechtsgeschichte* (Innsbruck, 1891–99); Heusler, *Institutionen des deutschen Privatrechts* (Leipzig, 1885–86); Zoepfl, *Deutsche Rechtsgeschichte* (Braunschweig, 1871–72); Siegel, *Rechtsgeschichte* (3d ed., Leipzig, 1895); Lamprecht, *Deutsche Geschichte* (Vol. I, Berlin, 1891); Klein, *Das Eheverlöbniss* (Strassburg, 1881); and Galy, *La famille à l'époque mérovingienne* (Paris, 1901). For many illustrative particulars should be consulted Grimm's *Rechtsalterthümer* (Göttingen, 1854); the great work of Weinhold, *Die deutschen Frauen* (Vienna, 1882); which may be read in connection with his *Altnordisches Leben* (Berlin, 1856). To supplement Weinhold's works for the more general culture-history of woman in the German family may be consulted Dahn, "Das Weib in altgerm. Recht und Leben," in his *Bausteine*, VI (Berlin, 1884); Rull-

koetter, *Legal Position of Women among the Ancient Germans* (Chicago, 1900); Strack, *Aus dem deutschen Frauenleben* (Leipzig, 1873–74); Scherr, *Geschichte der deutschen Frauenwelt* (3d ed., Leipzig, 1873); Bernhöft's lively *Frauenleben in der Vorzeit* (Wismar, 1893); Backer, *Le droit de la femme dans l'antiquité: son devoir au moyen âge* (Paris, 1880); the quaint treatise of Grupen, *De uxore theotisca* (Göttingen, 1748); the paper of Schmitt, *Die Schlüsselgewalt der Ehefrau nach deutschem Recht* (Munich, 1893); and that of Reinsch, *Stellung und Leben der deutschen Frau im Mittelalter* (Berlin, 1882).

Further illustrations of domestic and social life are afforded by the literature of "left-hand" marriages. Thus Klein's short dissertation, entitled *Beiträge zur Lehre von der morganatischen Ehe* (Erlangen, 1897), traces the practice back to ancient Frankish law. See also Culmann, *Morganatische Ehe und Ursprung des Feudalismus* (Strassburg, 1880); Zetzkius, *De matrimonio ad morganaticam contracto, vulgo: von Vermählung zur linken Hand* (Regiomonti, 1692); the anonymous *Geschichte morganatischer und legitimirter Fürsten- und Grafen-Ehen in Deutschland* (Halle, 1874), which gives a chronological account, century by century, of particular "left-hand" marriages; and the dissertations of Linckens, Riccius, and Höltzl von Sternstein.

Besides the controversial literature relating to the so-called *droit de seigneur* in feudal times, already cited in Bibliographical Note II, there has been collected a mass of custom and folk-lore concerning the alleged traces of wife-purchase and wife-capture, and similar matters, much of which will carry the reader beyond the period of the present chapter, but which may serve to complete the picture of mediæval private life. In this connection may be noted Wackernagel, "Familienrecht und Familienleben der alten Germanen," in *Süddeutsches Taschenbuch*, 1846 (257 ff.); Schincke, "Hochzeitsgebräuche der Germanen," in Ersch und Gruber's *Encyklopädie*, II. Sect., T. 9 (166 ff.); Leber, "Des coutumes et usages anciens relatifs aux mariages," in his *Collection des meilleurs dissertations*, II (Paris, 1838); Freybe, *Altdeutsches Frauenlob* (Leipzig, 1873); Schütz, *Lobschrift auf die Weiber der alten Deutschen* (Hamburg, 1776); Schulenburg, *Die Spuren des Brautraubes, Brautkaufes und ähnlicher Verhältnisse in den französischen Epen des Mittelalters* (Rostock, 1894); Spirgatis, "Verlobung und Vermählung im altfranzösischen volkstümlichen Epos," in *Wissenschaftliche Beiträge zum Jahresberichte des Leibniz-Gymnasiums zu Berlin*, Ostern, 1894 (Berlin, 1894); Krabbes, *Die Frau im altfranzösischen Karlsepos* (Marburg, 1884); Bücher, *Die Frauenfrage im Mittelalter* (Tübingen, 1882); Homeyer, *Ueber die Heimath nach altdeutschem Recht, insbesondere über das Hantgemal* (Berlin, 1852); Méril, "Des formes du mariage et des usages populaires qui s'y rattachaient surtout en France pendant le moyen age," in *Étude sur*

quelques points d'archéologie (Paris and Leipzig, 1862); Bérenger-Ferraud, "Mariage et progéniture," in his *Superstitions et survivances*, II (Paris, 1896); and especially Beauchet's able monograph, *Étude historique sur les formes de la célébration du mariage dans l'ancien droit français* (Paris, 1883); Gengler, *De morgengaba secundum leges antiquissimas germanorum* (Bamberg, 1843); Spangenberg, *Exercitatio antiqua doni germanorum matutini, quod vulgo morgengabam appellant* (Göttingen, 1767); Napiersky, *Die Morgengabe des rigischen Rechts* (Dorpat, 1842); Golz, *De morgengaba germanorum* (Halle, *ca.* 1860); Fischel, *De conjugum jure germanico debitis* (Berlin, n. d.). Similar observations have been made for other parts of Europe. See, for example, Poggi, *Usi nuziali nel centio della Sardegna* (Sassari, 1894); Murra, *Usi e costumi nuziali de Sardegna:* for the *Nozze de Cian-Sappa-Flandinet* (Bergamo, 1894); Salmone-Marino, *Come se prepari la sposa; uso nuziale dei contadini di Sicilia* (Palermo, 1890); Pitre, *Usi nuziali del popolo Siciliano* (Palermo, 1878); *idem, Usi natalizi, nuziali e funebri del popolo Siciliano* (Palermo, 1879); Frati, *Costumanze e pompe nuziali bolognesi nel medio evo:* for the *Nozze Cian-Sappa-Flandinet* (Bergamo, 1894); Reinsberg-Düringsfeld, "Lieben und Freien in Piemont," in *Illustrirte Frauenzeitung*, June 7, 1875 (Berlin, 1875); Sakellarios, *Die Sitten und Gebräuche der Hochzeit bei den Neugriechen verglichen mit denen der alten Griechen* (Halle, 1880); Gubernatis, *Storia comparata degli usi nuziali in Italia e presso gli altri popoli Indo-Europei* (2d ed., Milan, 1878); and Gennari, *Degli usi de Padovani de' tempi di mezzo ne' loro matrimonj* (Venice, 1800).

On the controversy as to the meaning of *mund* and its place in the purchase contract, in connection with the views of Sohm, Dahn, Brunner, Lehmann, Schroeder, and others, see Waitz, "Ueber die Bedeutung des Mundium im deutschen Recht," in *Sitzungsberichte der preuss. Akad.*, 1886; and Kohler, "Die Ehe mit und ohne Mundium," in *ZVR.*, VI. This question, as well as other matters, is also treated by Dargun, *Mutterrecht und Raubehe* (Breslau, 1883); Kraut, *Vormundschaft* (Göttingen, 1835–59); and by Rive in his excellent *Vormundschaft im Rechte der Germanen* (Braunschweig, 1862). Scheurl's *Das gemeine deutsche Eherecht* (Erlangen, 1882), though relating mainly to a later period, is of use for this chapter; as are also Königswarter, *Histoire de l'organisation de la famille en France* (Paris, 1851); and Laboulaye's very rare book, *Condition civile et politique des femmes* (1843); Hofmann's interesting monograph, *Ueber den Verlobungs- und Trauring* (Vienna, 1870); Junius, *De annulo romanorum sponsalitio* (Leipzig); and Müller, *De annulo pronubo, vulgo vom Jaworts- oder Trauring, de modo computationis graduum, de osculo sancto* (Jena, 1734).

The strong tendency of Roman legislation of the lower (Christian) empire to re-establish the family authority and place the wife in subjection is ably discussed by Meynial, "Le mariage après les invasions," in *Nouv. rev. hist. de droit*, XX, 514–31, 737–62; XXI, 117–48 (Paris, 1896–97); with this may be read Zoepfl, *De tutela mulierum germanic.* (Heidelberg, 1828); and Stobbe, "Die Aufhebung der väterlichen Gewalt nach dem Recht des Mittelalters," in his *Beiträge* (Braunschweig, 1865). Koehne has investigated "Die geschlechtsverbindung der Unfreien im französischen Recht," in Gierke's *Untersuchungen*, XXII (Breslau, 1888); and the matrimonial relations of the servile classes are also treated by Jastrow, *Zur strafrechtlichen Stellung der Sklaven bei Deutschen und Angelsachsen*, *ibid.*, II (Breslau, 1878); Luchaire, *Manuel des institutions françaises*, 203, 295, 301–3 (Paris, 1892); Rambaud, *Histoire de la civilisation française*, I, 102, 154, 125, *passim* (Paris, 1898); Mone, Bader, and Dambacker, "Eherecht der Hörigen im 13.–16. Jahrhunderte," *Zeitschrift für Geschichte des Oberrheins*, VII, 2 (1856); and in a paper "Von Loslassung der unterthänigen Weibspersonen in der Oberlausitz zum Verheurathen," in *Arbeiten einer Gesellschaft in der Oberlausitz*, II, 118 ff. (1750).

For Anglo-Saxon marriage the best monograph is Young's "Anglo-Saxon Family Law," in *Essays* (Boston, 1876). Very good papers also are Amira's *Erbenfolge und Verwandtschafts-Gliederung nach den altniederdeutschen Rechten* (Munich, 1874); and Ashworth, *Das Witthum* (*Dower*) *im englischen Recht* (Frankfort, 1898). Opet, "Die erbrechtliche Stellung der Weiber in der Zeit der Volksrechte," in Gierke's *Untersuchungen*, XXV (Breslau, 1888), strongly combats the commonly accepted theory that the Anglo-Saxon woman was neglected in the law of inheritance; in this agreeing with Turner, *History of the Manners, Landed Property, &c., of the Anglo-Saxons* (1805); and criticising Glasson, *Droit de succession* (Paris, 1886), which may be read with his *La famille et la propriété chez les Germains* (Orleans, 1885). Henry Adams in *Historical Essays* (New York, 1891) likewise takes a very favorable view of the legal condition of the early German married woman. Roeder, *Die Familie bei den Angelsachsen* (Halle, 1899), has made good use of literary sources. Pollock and Maitland, *History of English Law* (Cambridge, 1895), give a clear and concise sketch of old English matrimonial custom; and there is an excellent article by Florence Buckstaff in the *Annals of the American Academy*, IV, on "Married Woman's Property in Anglo-Saxon and Anglo-Norman Law" (Philadelphia, 1894). Of service also are Wright, *History of Domestic Manners and Sentiments in England during the Middle Ages* (London, 1862); Thrupp, *The Anglo-Saxon Home* (London, 1862); Esmein's edition of Gide, *Étude sur la condition privée de la femme* (Paris, 1885); Lingard, *History and Antiquities of the Anglo-Saxon*

Church (London, 1845; 2d ed., London, n. d.); Phillips, *Geschichte des angelsächsischen Rechts* (Göttingen, 1825); *idem, Reichs- und Rechtsgeschichte seit der Ankunft der Normannen* (Berlin, 1827–28); Hodgetts, *Older England* (London, 1884); Jeaffreson, *Brides and Bridals* (London, 1872); and Glasson, "La famille," in his *Histoire du droit et des institutions de l'Angleterre*, I. For further illustration of matrimonial law and custom read Dezert, *Les unions irrégulières en Navarre* (Caen, 1892); and Hanauer, "Coutumes matrimoniales au moyen age," in *Mémoires de l'académie de Stanislas* (Nancy, 1892).]

I. THE PRIMITIVE REAL CONTRACT OF SALE AND ITS MODIFICATIONS

IT is not improbable, as already explained, that wife-capture may have existed among our ancestors,[1] though some of the evidence for its survival collected from the folk-laws by Dargun and others may perhaps more rationally be regarded merely as proof of the brutality and lawlessness incident to the transitional period of the "barbarian invasion."[2] The testimony of the law-books, however, points more clearly to the former existence of wife-purchase. With the Old English, as well as among the other Teutonic peoples, at the dawn of history marriage was a private transaction, taking the form of a sale of the bride by the father or other legal guardian to the bridegroom. The procedure consisted of two parts. First was the *beweddung*, or betrothal; and

[1] BRUNNER, *Rechtsgeschichte*, I, 72, 73, and the sources there cited. The former existence of wife-capture among the Germans is also held by SIEGEL, *Rechtsgeschichte*, 450; HEUSLER, *Institutionen*, II, 280; SCHULENBURG, *Die Spuren des Brautraubes*, 10 ff.: BERNHÖFT, *Frauenleben*, 8 ff.; LAMPRECHT, *Deutsche Geschichte*, 97 ff., 107 ff.; SEHLING *Unterscheidung der Verlöbnisse*, 29; OPET, *Die erbrechtliche Stellung der Weiber*, 16 ff.; COLBERG, *Ueber das Ehehinderniss der Entführung* (Leipzig, 1869), 25.

[2] DARGUN, *Mutterrecht und Raubehe*, 111-25, critically examines these passages. The fact that a marriage effected by rape or abduction is often treated as valid, even when the purchase price is not paid, is especially urged as evidence of the survival of customary wife-capture. Thus in ÆTHELBERHT, 82, 83; ÆLF., 8; ÆTHELRED, VI, 26, 39: SCHMID, *Gesetze*, 9, 75, 231, 301, a penalty is exacted in such cases, though the marriage appears to be valid. But is it not simpler to explain this on grounds still familiar to all? The suggestion of the text seems to be sustained by the materials collected by WEINHOLD, *Deutsche Frauen*, I, 308-15. *Cf.* JEAFFRESON, *Brides and Bridals*, I, 12-31.

second, the *gifta*, or actual tradition of the bride at the nuptials.[1] The *beweddung* was a "real contract of sale,"[2] essential to which was one-sided performance; that is, payment by the bridegroom of the *weotuma* or *Witthum*, the price of the bride.[3] In ancient times the person of the woman was doubtless the object of purchase; and within the historical period woman, among most Teutonic peoples, remained in perpetual tutelage.[4] When the guardianship of the father or other male relative, as representative of the clan-group or *Sippe*, ended, that of the husband began. But, however hard may have been the lot of the married woman, manifestly her

[1] *Beweddunge* is the Anglo-Saxon term, and it is so used in the old English formulary of the tenth century: SCHMID, *Gesetze*, Anhang, VI, 390. It means the act of "contracting" or "pledging," associated with the verb *beweddian*, "to contract": SCHMID, 535, 536. It has the same origin as the modern "wed," "wedding," etc. On the *beweddung* see SIEGEL, *Deutsche Rechtsgeschichte*, 450 ff.

[2] In early German law the "real contract" is the only contract recognized. There is no contract by mere convention, no "consensual" contract. Originally two-sided fulfilment was required. Thus, according to SOHM, *Eheschliessung*, 24 ff., in case of betrothal, payment of the price and tradition of the bride went hand in hand. Later one-sided performance, or even a formal act, was deemed sufficient, and through it the *title* was actually transferred; the purchaser thus acquiring the "negative" as opposed to the "positive" rights of property—the power to use and enjoy. *Cf.* HABICHT, *Altdeutsche Verlobung*, 6, 7; LOENING, *Geschichte des deutschen Kirchenrechts*, II, 577-79; YOUNG, in *Essays*, 167; LEHMANN, *Verlobung und Hochzeit*, 77; FRIEDBERG, *Verlobung und Trauung*, 7, 8; STOBBE, *Reuerecht und Vertragschluss nach älterem deutschem Recht* (Leipzig, 1876).

[3] Anglo-Saxon *weotuma: ÆLFRED, Ecc. Laws*, 12, 29: SCHMID, *Gesetze*, 58, 62. SCHROEDER uses the term *Muntschatz*, which, however, is only found in Friesic law: SOHM, *Eheschliessung*, 33, note. Some form of *weotuma* appears in many dialects: Old German *widemo*, giving rise to *Witthum*: Longobardian *meta*; Burgundian *wittemon*; Friesic *wetma* (*wethma*, *weetma*); Alamannian *widem:* SCHROEDER *Güterrecht*, I, 46, 47, 24; SCHMID, *op. cit.*, 675; GRIMM, *Rechtsalterthümer*, 422-24; YOUNG, in *Essays*, 165; WEINHOLD, *Deutsche Frauen*, I, 320, note, 336, *passim;* SCHROEDER, *Rechtsgeschichte*, 291, note, 161. *Cf.* ECKHARDT, "Das Witthum," in *Zeitsch. für deutsches Recht*, X, 437 ff.; HELLWALD, *Die mensch. Familie*, 315, 316; SMITH, *La famille chez les Burgondes*, 5 ff.

[4] On the tutelage of woman in early Germanic law see GRIMM, *Rechtsalterthümer*, 447 ff., 465; SOHM, *Eheschliessung*, 22, 50 ff.; WEINHOLD, *Deutsche Frauen*, I, 193 ff.; II, 27; GIDE, *Étude sur la cond. privée de la femme*, 280 ff., 339; RIVE, *Vormundschaft*, I, 218 ff.; KRAUT, *Vormundschaft*, I, 171-86; LEBER, *Des coutumes*, 22 ff.; REINSCH, *Stellung und Leben der deutschen Frau*, 4 ff.; HABICHT, *Altd. Verlobung*, 8 ff., 68; FRIEDBERG, *Eheschliessung*, 17 ff., *passim;* SCHROEDER, *Güterrecht*, I, 1 ff.; *idem*, *Rechtsgeschichte*, 64 ff., *passim;* BRUNNER, *Rechtsgeschichte*, I, 75, 89 ff.; DARGUN, *Mutterrecht und Raubehe*, 23 ff.; KOHLER, "Die Ehe mit und ohne Mundium," *ZVR.*, VI, 321 ff.; WAITZ, in *Sitzungsberichte der preuss. Akademie*, 1886, 375 ff.; BUCKSTAFF, in *Annals of Am. Acad.*, IV, 233 ff.; STOBBE, "Die Aufhebung der väterlichen Gewalt

condition was very different from that of a chattel. This fact is not wholly inconsistent with wife-purchase; for, as already seen, a certain liberty, even of choice, may be enjoyed by the woman where she is legally the object of sale. It has given rise to a theory of the betrothal which it is thought the records sustain. The *weotuma*, it is contended, must be looked upon as the price of the *mund*, or protectorship over the woman, which is transferred from the father or legal guardian to the husband. This is the view now perhaps most generally accepted, but it has by no means gone unchallenged.[1]

nach dem Recht des Mittelalters;" in *Beiträge*, 1–24, reviewing and criticising KRAUT; ZOEPFL, (R.), *De tutela mulierum germanic.* (Heidelberg, 1828); EMMINGHAUS, *De praecipuis germ. fem.* (Jena, 1756); and ZOEPFL (H.), *Deutsche Rechtsgeschichte*, III, 1–4. YOUNG, "Anglo-Saxon Family Law," *Essays*, 148 ff., denies that *patria potestas* existed in German law; and a similar view is taken by ADAMS, *Political Essays*, 31 ff.; but HEUSLER, *Institutionen*, II, 275, takes the opposite view. *Cf.* SMITH, *La famille chez les Burgondes*, 13 ff. FICKER, *Untersuchungen zur Rechtsgeschichte*, III, 401 ff., insists that the sex-tutelage (*Geschlechtsvormundschaft*) did not exist under Frank law.

[1] That the betrothal is a contract relative to the *mund* is stoutly maintained by DAHN, *Das Weib in altgerm. Recht und Leben*, 4 ff., who absolutely rejects wife-purchase, declaring such an idea to be "abominable and impossible" ("abscheulich und unmöglich"). This theory is also held by KRAUT, *Vormundschaft* I, 171; SCHROEDER, *Güterrecht*, I, 27 ff., 38, 79; yet SCHROEDER, *Rechtsgeschichte*, 68, 291 ff., regards the German marriage as in form a purchase of the bride. RIVE, *Vormundschaft*, I, 258 ff., *passim*, denies that the betrothal has any relation to the *mund*, and rejects entirely the view that the sale-marriage ever existed among the Germans. HABICHT, *Altdeutsche Verlobung*, 8 ff., 12, admits that originally the *mund* was a "property right" and the wife a "thing," though in the earliest written sources she appears as *Rechtssubject*. SOHM, *Eheschliessung*, 22, regards the *Witthum* as the price of the *mund;* but in his *Trauung und Verlobung*, 15, 16, he drops this view and declares the betrothal to be a contract to "give the bride in marriage," or, more directly, a "Kauf der Jungfrau." FRIEDBERG, *Eheschliessung*, 17, 18, appears to hold that it was the *mund* which was conveyed; but elsewhere he seems to favor the opposite view for the early period. See his *Verlobung und Trauung*, 7 ff.; *Lehrbuch*, 339; and *Zur Geschichte*, 362 ff. Pollock and Maitland, *Hist. of Eng. Law*, II, 362, declare that "whatever guesses we may make about a remoter age, the 'bride-sale,' of which Tacitus had heard, was evidently no sale of a chattel. It was very different from the sale of a slave girl; it was a sale of the *mund*, the protectorship over the woman." GIDE, *Étude sur la cond. privée de la femme*, 196–215, 335 ff.; and HENRY ADAMS, *Historical Essays*, 31, are decidedly of the same opinion. BUCKSTAFF, in *Annals of Am. Acad.*, IV, 234, doubts whether the German woman was ever looked upon as a chattel; and OPET, "Die erbrechtliche Stellung der Weiber in der Zeit des Volksrechts," in GIERKE'S *Untersuchungen*, XXV, takes a very favorable view of woman's right of inheritance.

On the other hand, the betrothal is regarded as originally an actual sale of the bride by GLASSON, *Hist. du droit et des inst. de l'Angleterre*, I, 116, 117; GROSSE, *Die Formen der Familie*, 223, 234; SIEGEL, *Rechtsgeschichte*, 450–52; WEINHOLD, *Deutsche*

Ethically and historically, as suggested in the preceding chapter, the rise of a legal distinction between the purchase of property in the wife and the acquirement of authority over her is highly important. But, practically, when the powers of the husband are so great as they were among our ancestors, there can be little difference in popular conception between possession of the *mund* and ownership of the woman.[1] As a matter of fact, the old English laws speak bluntly of "buying a maid;"[2] and in Germany "to buy a wife" was a familiar phrase for marriage throughout the Middle Ages.[3]

Whatever its essential character, there is abundant evidence of the widespread existence of sale-marriage among

Frauen, I, 320; HEUSLER, *Institutionen*, II, 279 ff.; LOENING, *Geschichte des deutschen Kirchenrechts*, II, 578; HOFMANN, *Ueber den Verlobungs-und Trauring*, 849, 850; LEBER, *Des coutumes*, 22 ff.; LAMPRECHT, *Deutsche Geschichte*, I, 104, 105; SEHLING, *Unterscheidung der Verlöbnisse*, 32, 33; GRIMM, *Rechtsalterthümer*, 420 ff.; DAVOUD-OGHLOU, *Législation des anciens Germains*, I, xl–xli; HELLWALD, *Die mensch. Familie* (apparently), 315–18; DARGUN, *Mutterrecht und Raubehe*, 24 ff.; and especially BRUNNER, *Rechtsgeschichte*, I, 74 ff. LEHMANN, *Verlobung und Hochzeit*, 7 ff., 78, 79, finds fainter traces of the sale-marriage among the Scandinavians than among the North Germans. KOHLER, "Die Ehe mit und ohne Mundium," *ZVR.*, VI, 321 ff., holds that marriage without *mund* on the part of the husband is the marriage of mother-right as opposed to the later *Paternitätsrecht*. See also KOHLER, in *ZVR.*, III, 354; and WAITZ, "Ueber die Bedeutung des Mundium im deutschen Recht," *Sitzungsberichte der preuss. Akad.*, 1886, 375 ff., for a discussion of the meaning and content of *mund*. In general, *cf.* KÖNIGSWARTER, *Hist. de l'organisation de la famille*, 121 ff.; LABOULAYE, *Condition des femmes*, 112 ff.; STRACK, *Aus dem deutschen Familienleben*, I, 17 ff.; BEAUCHET, *Mariage dans le droit islandais*, 3 ff., 12 ff.

[1] HABICHT, *Altdeutsche Verlobung*, 9, note, 68, insists that there is no practical difference between the sale of the *Vormundschaft*, or protection, and the sale of the bride. See FICKER, *Untersuchungen zur Rechtsgeschichte*, III, 393–419, who rejects the view that marriage has the same origin and character among all the German peoples.

[2] ÆTHELB., 77: SCHMID, *Gesetze*, 8, 9. LIEBERMANN, 7, translates: "Wenn jemand eine Jungfrau zur Ehe kauft." Another provision of this code reads: "If a free man lies with a free man's wife, let him buy her with her wergeld, and procure with his own property another woman and bring her home to him (the wronged husband)": ÆTHELRED, 31: SCHMID, 4, 5. *Cf.* LIEBERMANN'S ed., 5. See ROEDER, *Die Familie bei den Angelsachsen*, 15 ff., 24 ff.

[3] BRUNNER, *Rechtsgeschichte*, I, 74: "Wife-purchase is yet known to the earlier East Frisian sources, and it was still practiced in Denmark in the fifteenth century. "Und wie im Mittelalter die Redensart eine Frau zu kaufen vielfach verbreitet war, so bezeichnet in Holland der Volksmund noch jetzt die Braut als 'verkocht' (verkauft)."

the Teutonic nations. Tacitus, who was struck by a custom so much at variance with the Roman practice of his day, has given in the eighteenth chapter of the *Germania* the earliest description of a *beweddung*. "The wife," he says, "does not offer a *dos* to the husband, but the husband offers one to the wife. Parents and relatives are present; they approve the gifts, not seeking those trifles which are pleasing to women, nor those with which a newly wedded bride is adorned; but oxen, a bridled horse, and a shield with sword and spear. For these gifts the wife is obtained, and she, in turn, brings something of arms to her husband. These they regard as the highest bond, the most mysterious sacra, the gods of marriage."[1] In this passage the essential character of the *weotuma*, that is the gifts, is clearly recognized; and though the historian represents it as being paid to the bride, it is probable that in this particular he is mistaken, and that, in accordance with the early practice, it was really paid to the guardian,[2] for it is very unlikely that the stage of the dower had already been reached.

In the earliest English codes the contract is found in its rudest form. Besides *weotuma*, various other terms appear for the bride-money. Such are *gyft*, *feoh*, *pretium*, and

[1] "Dotem non uxor marito, sed uxori maritus offert. Intersunt parentes ac propinqui; probant munera, non ad delicias muliebres quaesita, nec quibus nova nupta comatur, sed boves et frenatum equum et scutum cum framea gladioque. In haec munera uxor accipitur, atque invicem ipsa armorum aliquid viro affert. Hoc maximum vinculum, haec arcana sacra, hos conjugales deos arbitrantur."—TACITUS, *Germania*, c. 18.

[2] SCHROEDER, *Güterrecht*, I, 24 ff., 82, 83, has shown that this is probable; and such is the view of GRIMM, *Rechtsalt.*, 423, 424. ZOEPFL, *Deutsche Rechtsgeschichte*, III, 4, believes Tacitus, "vermengt unverkennbar die verschiedenen Gaben, welche nach den Volksrechten des folgenden Zeitraumes unter der Bezeichnung als *pretium* und Morgengabe hervortreten, wovon die eine dem Vater oder Vormund der Frau, und die andere dieser selbst gebührte;" and the arms given by the bride to the bridegroom he identifies with the later well-known ceremony of "girding" the youth on reaching majority. *Cf.* on this passage also HEUSLER, *Institutionen*, II, 277; THUDICUM, *Der altdeutsche Staat*, 148, 186; LABOULAYE, *Cond. des femmes*, 113; SIEGEL, *Deutsche Rechtsgeschichte*, 452; GIDE, *Étude sur la cond. privée de la femme*, 205 ff.; FICKER, *Untersuchungen zur Rechtsgeschichte*, III, 416–19, 394, believes Tacitus here describes correctly the *Vidumsehe*, the marriage in which the *Vidum* or price came to the woman herself.

pecunia pro puella data.[1] According to a provision of Æthelberht, already referred to, "If a man buy a maiden with cattle (*ceapi*) let the bargain stand, if it be without guile; but if there be guile, let him bring her home again, and let his property be restored to him."[2] Another law of the same king declares: "If a man carry off a maiden by force, let him pay fifty shillings to the owner, and afterwards buy of the owner the latter's consent [to the marriage]. If she be betrothed to another man in money (sceat), let him make bot [to this bridegroom] with twenty shillings."[3]

Still, it will not be wise to accept too literally the apparent statements of the early codes relative to the marriage relation, for they are often brief and obscure, devoid of qualifying terms, and must be construed in the light of other facts. Thus Opet's researches seem to show clearly that in the historical period women were not so much neglected in the ancient law of inheritance as has usually been supposed.[4]

[1] SCHROEDER, *Güterrecht*, I, 50; *idem*, *Rechtsgeschichte*, 292; SOHM, *Trauung und Verlobung*, 15; LABOULAYE, *op. cit.*, 113.

[2] ÆTHELB., 77: THORPE, *Ancient Laws*, 22, 23, and n. 3; SCHMID, *Gesetze*, 8, 9. LIEBERMANN, 7, renders the first part of this passage: "Wenn jemand eine Jungfrau [zur Ehe] kauft, sei sie durch [Braut] Kaufgeld [giltig] erkauft, falls das [Rechtsgeschäft] untrügerisch ist." *Cf. Poeniten. Theod.*, XVI, 29: THORPE, II, 11, or *Poeniten. Theod.*, II, xii, § 34, in WASSERSCHLEBEN'S *Bussordnungen*, 216; with *Confess. Ecgb.*, § 20: THORPE, II, 147; or the same in WASSERSCHLEBEN, 309. See also SCHROEDER, *Güterrecht*, I, 51 n. 9.

[3] ÆTHELB., 82, 83: THORPE, I, 24, 25; LIEBERMANN, 8; *cf.* SCHROEDER, *op. cit.*, 51 n. 10.

[4] OPET, *Die erbrechtliche Stellung der Weiber in der Zeit der Volksrechte*, 82 ff. This monograph may be compared with that of AMIRA, *Erbenfolge und Verwandtschaftsgliederung nach dem altniederdeutschen Rechte*, 83, 84. ROEDER, *Die Familie bei den Angelsachsen*, 15 ff., takes a conservative position. In general on old English marriage see PHILLIPS, *Geschichte des angelsächs. Rechts*, 129–33; DAVOUD-OGHLOU, II, 355–60; YOUNG, in *Essays*, 163 ff.; FRIEDBERG, *Eheschliessung*, 33 ff.; LINGARD, *Anglo-Saxon Church* (2d ed.), I, 6 ff.; TRAILL, *Social England*, I, 215, 216; GIDE, *Étude sur la cond. privée de la femme*, 237, 196 ff.; POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 362 ff.; BUCKSTAFF, in *Annals*, IV, 233; LUDLOW, in *Dict. of Christ. Ant.*, I, 203, 143. There is also a good discussion by GLASSON, *Hist. du droit et des inst. de l'Angleterre*, I, 104–33; an account of the Anglo-Saxon bride in GRUPEN, *De uxore theotisca*, 221–55; interesting details in THRUPP, *The Anglo-Saxon Home*, 19–76; WRIGHT, *Hist. of Doms. Manners and Sentiments*, 53–56; TURNER, *Hist. of Manners and Landed Property of Anglo-Saxons*, 108, 113–15; and JEAFFRESON, *Brides and Bridals*, I, 32–45, who gives an interesting discussion regarding the Anglo-Saxon

Similar evidences of the sale-marriage are afforded by the South German folk-laws.[1] Among the Salian Franks the bride-price appears in form of the *arrha*, to be described presently, through the payment to the guardian by the bride-groom of the "golden shilling and the silver penny." In this form the *arrha* was paid by the representatives of Chlodwig, the Frankish king, at his betrothal with Chlotilde, sister and ward of Gundobad, king of the Burgundians.[2] Faint traces of wife-purchase survive in the Bavarian[3] and Alamannian codes;[4] while in the *lex saxonum* marriage is simply described as *uxorem emere*, or "buying a wife."[5] The sale-contract retains much of its primitive character, in spite

woman, as a chattel subject to sale, even in the historical period. "To these ancient arrangements for the transference of women from their fathers to their matrimonial suitors, and for protecting the property in them against nefarious aggressors," he declares, "must be referred the barbarous spirit in which the law still persists in regarding a certain class of atrocious outrages on morality as mere infringements of private right. We reflect with astonishment on the conduct of our distant progenitors, who legalized traffic in womankind, but we persevere, so far as law is concerned, in dealing with the seducer as though his offence were nothing graver than a violation of personal privileges, for which a payment of money to one of the injured persons is the appropriate penalty" (I, 42, 43).

[1] An exhaustive study of these laws is, of course, not attempted. They are thoroughly exploited in the works of Sohm, Brunner, Schroeder, Friedberg, Dargun, and others.

[2] "Legati offerentes solidum et denarium, ut mos erat Francorum, eam partibus Chlodovei sponsant: placitum ad praesens petentes, ut ipsam ad conjugium traderet Chlodoveo."—FREDEGARIUS, *Greg. Turon. hist. epit.*, c. xviii: in GUADET AND TARANNE'S ed., IV, 172, 173; or in GIESEBRECHT'S trans., II, 273–75. Compare SOHM, *Eheschliessung*, 32 n. 21; SCHROEDER, *Güterrecht*, I, 55 n. 3, and authorities cited; MERIL, *Des formes*, 30; LEBER, *Des Coutumes*, 24; WEINHOLD, *Deutsche Frauen*, I, 323; FRIEDBERG, *Eheschliessung*, 19 n. 7. The price of a maid is not fixed in the *lex salica;* but in c. 44 the price of a widow is given (BEHREND, 58); and elsewhere the woman's *mund* is fixed at 62½ solidi. FICKER, *Untersuchungen zur Rechtsgeschichte*, III, 400, 401, regards the *arrha*, not as a survival of the bride-price, but as a symbol of mutual troth.

[3] SOHM, *op. cit.*, 29 n. 15; FRIEDBERG, *Eheschliessung*, 19. *Cf.*, however, WEINHOLD, *op. cit.*, I, 323, who says that wife-purchase has disappeared from the Bavarian and Alamannian laws. See PERTZ AND BRUNNER'S ed., *Mon. germ. hist.: legum*, III, 183–496 (*Leges baiuwariorum*), 1–182 (*Leges alamannorum*).

[4] *Puella empta* appears in the *Pactus alamannorum*, 3, 29. *Cf.* SCHROEDER, *Güterrecht*, I, 17 ff.; WEINHOLD, *op. cit.*, I, 323; FRIEDBERG, *op. cit.*, 19.

[5] "Lito regis liceat uxorem emere, ubicunqui voluerit. Sed non liceat ullam foeminam vendere."—*Lex saxonum*, tit. 18: WALTER, *Corpus juris germ.*, I, 389. Tit. 6 fixes the price at 300 solidi: WALTER, I, 386.

of ecclesiastical influences, in the West Gothic, Burgundian, and Lombard codes. Among the West Goths the betrothal was almost as binding as a marriage. The father or other legal protector might contract his daughter or ward against her will. If she disregards such a contract and marries another man, both bride and bridegroom are "handed over to the power" of him to whom she was betrothed by her father or guardian, "and any relatives abetting the marriage shall pay a penalty of gold."[1] The provisions of the other two codes last mentioned are conceived in a similar spirit.[2] Moreover, even in the customs of the Scandinavian North forms and phrases have survived which seem to point unmistakably to the former existence of wife-purchase.[3]

During the period of the law-books, both in England and on the continent, the amount of the bride-money was generally fixed by custom or by statute. The price established seems usually to have equaled the value of the *mund* or that of the *wergeld*, which depended upon the rank of the woman.[4] While the law thus fixed the amount of the bride-

[1] *Lex wisigoth.*, lib. iii, tit. i, 2: WALTER, *Corpus juris germ.*, I, 466; LUDLOW, in *Dict. Christ. Ant.*, I, 203. The bride-money is here called *pretium*, elsewhere the betrothal is styled *mercatio:* BRUNNER, *Rechtsgeschichte*, I, 74 n. 23. The whole of liber iii, WALTER, I, 465-91, relates to marriage and allied matters.

[2] *Lex burgundionum*, tits. 12, 34, 51, 52, 66, 69: WALTER, I, 311, 320, 329, 330, 335, 336; for the Lombards, *Edictum Rotharis*, c. 178 ff.: WALTER, I, 710 ff., especially c. 182, which contains the form of betrothal. Compare this with the later ritual given by CANCIANI, II, 476, summarized by WEINHOLD, I, 341; LUDLOW, in *Dict. Christ. Ant.*, I, 203. See also *Liutprandi leges*, lib. ii, c. 7 ff., 88, 93, 99, 102, 106, 112, 115, 119, etc.: WALTER, I, 759 ff.

[3] LEHMANN, *Verlobung und Hochzeit*, 1 ff., 78, 79; WEINHOLD, *Altdeutsches Leben*, 240. SCHROEDER, *Rechtsgeschichte*, 287, denies that there are any sure traces of wife-purchase in northern law.

[4] SCHROEDER, *op. cit.*, 292; BRUNNER, *Rechtsgeschichte*, 75; WEINHOLD, *Deutsche Frauen*, I, 321 ff.; SOHM, *Eheschliessung*, 23, 24, who thinks the fixing of a legal price of great importance, the purchase of a maid being thus distinguished from that of a thing. The bride-money is thus the nominal price of an *unschätzbares* object; it admits no bargaining; but the explanation of HABICHT, *Altdeutsche Verlobung*, 12, 13, given in the text, is simpler and more probable. SCHROEDER, *Güterrecht*, I, 11 ff., in connection with each code, gives a mass of details relative to the violation of the *mund* by illegal marriage and the amount of the composition in each case. *Cf.* LABOULAYE, *Cond. des femmes*, 113; YOUNG, in *Essays*, 166; and ÆTHELBERHT, 31: THORPE, I, 11, where the *wergeld* is mentioned.

money, doubtless to facilitate an easy settlement of those cases in which marriages were illegally formed without payment of the *weotuma*, it by no means follows, as sometimes assumed, that its value was not ordinarily arranged by private agreement, as in the early period.

At a very early day it became customary—instead of the *weotuma* to pay to the guardian a small sum at the betrothal, called in general *arrha*[1]—the *Hand-geld* of the German writers—accompanied by promises and sureties for the payment of the price of the bride at the *gifta*, or nuptials. Strictly speaking, the *arrha* was neither a part payment nor even a symbolical payment of the *weotuma;* it was an act by which the real obligation implied by the contract of sale was engendered.[2] The practice of paying the *arrha* instead of the bride-money at the betrothal led to a change in the character of the marriage contract. "In the time of the folk-laws—from the sixth to the ninth century—we see among all the German tribes a change take place: the withum, that is the purchase price, is no longer paid to the guardian, that is the seller, but to the bride herself; so that the right of the guardian was practically limited to the receipt of the handgeld, that is to a merely formal fulfilment."[3] Thus, since the property of the wife was subject to the husband's control during his lifetime, the *weotuma*

[1] Latin *arrha*, *arra*, or *arrhabo;* Greek ἀρρᾰβών; Lombard *launichild*, *launegild*, perhaps the same as the German *Lohngeld*. It means "earnest money," and was used by the Romans in connection with bargains; also in general with other real contracts. *Cf.* SMITH, *Dict. Greek and Roman Ant.*, I, 193; BINGHAM, *Orig. Ecc.*, VII, 311; SCHROEDER, *Rechtsgeschichte*, 290, 295; *idem*, *Güterrecht*, I, 39, 55 ff.; HEUSLER, *Institutionen*, I, 80 ff.; SOHM, *Eheschliessung*, 28; ZOEPFL, *Deutsche Rechtsgeschichte*, III, 8 ff., 12-14; DAVOUD-OGHLOU, II, 59 n. 3; LUDLOW, in *Dict. Christ. Ant.*, I, 142-44. "Subarrare" is used in the ritual of the Greek church for disposing in marriage: see the ritual in BURN, *Parish Registers*, 141, 142.

[2] SOHM, *Eheschliessung*, 28-32, maintains this view against SCHROEDER, *Güterrecht*, I, 39, 40, 55, and others, who regard the *arrha* as a symbolical payment—a *Scheinpreis* or *symbolischer Muntschatz*. *Cf.* FRIEDBERG, *Eheschliessung*, 19; "Zur Gesch. der Eheschliessung," *ZKR.*, I, 364 ff.

[3] SOHM, *op. cit.*, 33.

was really transformed into a provision for the widow, payable only after death from the husband's goods.[1] The *beweddung* was still a "real contract," but not a "contract of sale."[2]

In this second stage, it has been thought, was the form of betrothal among the old English in the days of Ine and Ælfred; but the evidence is not entirely conclusive. Indeed, a provision of Ine, relied upon by Schroeder to prove that the price had not been paid at the betrothal, appears to show the opposite, according to the reading of Liebermann. "If a man buy a woman (as a wife) and the gifta or tradition take not place, let him (the woman's guardian) give the money back (to the bridegroom), pay as much more as penalty, and recompense the betrothal sureties (byrgean) in as much as the breach of their pledge is worth."[3] Even with this reading it is just possible that the money restored was the *arrha;* and that betrothal sureties were required mainly to secure damage in case the bride were not actually transferred. A law of Ælfred likewise shows the practice of taking surety; but in this case also it seems uncertain whether the pledges were given for the payment of the bride-money; for damage on failure to surrender the bride as a maid; or for both bride-price and damage combined, though the last hypothesis seems the most probable. "If a betrothed woman commit adultery, if she be of ceorlish degree, let a penalty of sixty shillings be paid to the betrothal sureties, and let it be in live-stock, things of value; and in it let no (unfree) man be given." If the woman be worth six hundred or twelve hundred shillings *wergeld*, the

[1] *Ibid.*

[2] *Ibid.*, 34. But FRIEDBERG, *Verlobung und Trauung*, 8-10, insists on the long survival of the sale-contract.

[3] INE, 31: LIEBERMANN, *Gesetze*, 103. The phrase "and sio (seo) gyft (gift) forth ne cume" was rendered by SCHROEDER, *Güterrecht*, I, 51 n. 8, followed by SCHMID, *Gesetze*, 34, 35, note, "if the purchase price be not paid"—a manifest error. *Cf.* THORPE, *Ancient Laws*, I, 123.

penalty is fixed at one hundred or one hundred and twenty shillings respectively.[1] But another law of Ælfred seems to reveal more clearly the second or transitional phase in the history of the wedding contract; for the bride-price is paid to the woman. It provides that in case a man sell his daughter into servitude, and the purchaser "allow his son to cohabit with her, let him (the son) marry her: and let him see that she have raiment, and that which is the worth of her maidhood, that is the weotuma; let him give her that."[2]

The transition from this last-named form of contract to a third and still more liberal one was easy and natural. Already in the tenth century the *beweddung* had become a merely "formal contract," the *wed*, *wette*, *Treugelöbniss*, *wadium*, or *fides facta* of the early laws.[3] In this case there was not even one-sided fulfilment through payment of the *arrha*, which in the form of wine-money was merely *promised* to the guardian;[4] but instead the agreement or convention was accompanied by sureties to pay the *weotuma* to the bride, and by a solemn act which created the obligation, and was therefore essential to the contract. Originally this solemn act consisted in giving and taking the straw (*festuca*) on the part of the bride and bridegroom. Instead of the straw, other objects were sometimes employed, such as a piece of cloth, an arrow, a number of gloves, and the like.[5] The oath or vow was also substituted for the solemn act; and, particularly in the later Middle Ages, the most

[1] ÆLFRED, 18: LIEBERMANN, *Gesetze*, 58–61. *Cf.* THORPE, *op. cit.*, I, 73; SCHMID, *op. cit.*, 81, 83; YOUNG, in *Essays*, 170.

[2] ÆLFRED, *Ecc. Laws*, 12: THORPE, *op. cit.*, I, 47. But ÆLFRED, *op. cit.*, 29, seems to show that the older practice of payment to the father also existed: THORPE, I, 52.

[3] The German *wette* and Anglo-Saxon *wed* are from the same root as *beweddung*.

[4] SOHM, *Eheschliessung*, 30, 31, 317, note.

[5] *Ibid.*, 34, 35; SCHROEDER, *Rechtsgeschichte*, 293, 294.

popular symbol by which the contract was closed was a "weakened" form of the oath, the *Handschlag*, or hand-fasting, so famous in connection with the history of English "secret" or "irregular" marriages.[1] It should be noted that after the betrothal assumes the form of the *wed*, the *weotuma* ceases to be of real importance and becomes a gift to the bride of little value; whereas now the object of real concern in the convention is the *morgengifu*, or *morning-gift*.[2] This was originally a small voluntary gift to the bride on the morning following the nuptials; but as the *weotuma* decreased the morning-gift increased in importance. It became customary to grant them both in the same instrument at the betrothal; so, at length, they were merged and became a regular legal provision for the widow. Such was the Lombard *quarta*[3] and the Frankish *tertia*;[4] the Norman *douaire*, and the *dos ad ostium ecclesiae* of Glanville, the predecessors of the modern English dower.[5]

This third phase of the *beweddung* may be clearly discerned in the English laws of the pre-Norman period, and seems to have been the prevailing form after the beginning of the tenth century. The following formulary, dating perhaps from the reign of Eadmund or Æthelstan, besides its peculiar interest as being the earliest English betrothal

[1] On the oath and *Handschlag*, see SOHM, *op. cit.*, 47-50; on hand-fasting, FRIEDBERG, *Eheschliessung*, 39 ff.

[2] On the morning-gift and dower see HEUSLER, *Institutionen*, II, 374-79; THRUPP, *The Anglo-Saxon Home*, 60; GUNDLING, *De emptione uxorum, dote et morgengaba* (Helmstedt, 1821); GENGLER, *Die Morgengaba* (Bamberg, 1843); ECKHARDT, "Das Witthum," *Zeitschrift für deutsches Recht*, X, 437 ff.; GRUPEN, *De uxore theotisca*, 49-140; BRUNNER, "Die frankisch-romanische Dos," *Berliner Sitzungsber.*, XXIV, 545 ff.; SIEGEL, *Deutsche Rechtsgeschichte*, 455-57; FRIEDBERG, "Zur Geschichte," *ZKR.*, I, 365, 366; SPIRGATIS, *Verlobung und Vermählung*, 14; SCHROEDER, *Güterrecht*, I, 84-94 ZOEPFL, *Deutsche Rechtsgeschichte*, III, 19-21.

[3] SCHROEDER, *Güterrecht*, I, 84-89. [4] *Ibid.*, 89-94.

[5] GLANVILLE, Lib. VI, cap. 1; PHILLIPS, *Englische Reichs- und Rechtsgeschichte*, II, 381. Compare SCHROEDER, *op. cit.*, I, 89; II, 24-67, *passim*; YOUNG, in *Essays*, 174; LABOULAYE, *Cond. des femmes*, 117 ff., 124 ff.; GRIMM, *Rechtsalt.*, 441; and especially the monograph of ASHWORTH, *Das Wittthum (Dower) im eng. Recht*, 9 ff., 18 ff.

ritual extant, is an excellent example of the formal contract, though some of its provisions are not clear:

"1. If a man desire to betroth a maiden or a widow, and it so be agreeable to her and her friends, then it is right that the bridegroom, according to the law of God, and according to the customs of the world, first promise and give a 'wed' to those who are her 'foresprecas,' that he desire her in such wise that he will keep her, according to God's law, as a husband shall his wife: and let his friends guarantee that.

"2. After that, it is to be known to whom the 'foster-laen'[1] belongs: let the bridegroom again give a 'wed' for this: and let his friends guarantee it.

"3. Then, after that, let the bridegroom declare what he will grant her, in case she choose his will, and what he will grant her, if she live longer than he.

"4. If it be so agreed, then it is right that she be entitled to half the property, and to all, if they have children in common, except she again choose a husband.[2]

"5. Let him confirm all that which he has promised with a 'wed;' and let his friends guarantee that.

"6. If they then are agreed in everything, then let the kinsmen take it in hand, and betroth their kinswoman to wife, and to a righteous life, to him who desired her, and let him take possession of the 'bohr'[3] who has control of the 'wed.'

[1] The meaning of "foster-laen" is uncertain. SCHMID wrongly identifies it with the *gyft* of INE, 31, and thinks it is the purchase price of the bride, that is, the *weotuma: Gesetze*, 34, 35, note. THORPE regards it also as the purchase price paid to the family of the bride: *Anc. Laws*, I, 254, note. SCHROEDER, *Güterrecht*, I, 51 n. 13, believes it to be a provision for maintenance of the children. But SOHM renders it *Weinkauf*, "drink-money," and this is probably right. It is a form or application of the *arrha*, which is not now paid down, but, the contract being formal, is promised to the guardian. The *arrha* had customarily been spent in treating the guests: *Eheschliessung*, 30, 31, 317, note.

[2] "The language of this law seems to indicate that the *legal* endowment of the woman was one-third of the chattels, as in INE, c. 57. By contract, however, before marriage, the husband might increase this to one-half."—THORPE, I, 255, note.

[3] The *bohr* was the surety for fulfilment of the pledges.

"7. But if a man desire to lead her out of the land, into another thane's land, then it will be advisable for her that her friends have an agreement that no wrong shall be done to her; and if she commit a fault, that they may be nearest in the 'bot,' if she have not whereof she can make 'bot.'"[1]

The form of betrothal here described is that of the *wed.* The *foster-laen*, or wine-money, a substitute for the *arrha*, is not paid down, but it is merely promised to the guardian; while the morning-gift—"in case she choose his will"—and the *weotuma*—"if she live longer than he"—are the important elements, and these belong to the bride.[2]

Such was the form of *beweddung* generally prevailing among the Germanic nations about the time of the Norman Conquest. It had been reached, as we have seen, only through several successive phases of development, not sharply defined, but overlapping each other. In the first stage, falling mainly or wholly within the prehistoric era, the betrothal is a real contract, according to which there is two-sided fulfilment. The payment of the price and the delivery of the bride go hand in hand.[3] In the second stage, existing at any rate from the time of Tacitus onward, the transaction is still in form a real contract of sale, but there is only one-sided fulfilment. The purchase price is paid to the guardian, but the tradition of the bride is postponed. Next a solemn act through payment of a nominal sum, or *arrha*, is deemed sufficient, the payment of the actual price, or *weotuma*, being

[1] THORPE, *Anc. Laws*, I, 255, 257, who classes this formulary with the laws of Eadmund. SCHMID leaves the date undetermined, but thinks it may with as much probability be ascribed to Eadmund or Æthelstan as any other king: *Gesetze*, lxv, and *Anhang*, VI, 391, 393. *Cf.* POLLOCK AND MAITLAND, *Hist. Eng. Law*, II, 367; and DIECKHOFF, *Kirchliche Trauung*, 68 ff., who gives the text of this ritual.

[2] SOHM, *Eheschliessung*, 155, 100 n. 60, 317. SCHROEDER, *Güterrecht*, I, 53, 54, 96, reverses the meaning of these passages; and holds that the phrase "in case she choose his will" refers to the *weotuma;* and the phrase "if she live longer than he," to the morning-gift. But see POLLOCK AND MAITLAND, II, 363, who render the last clause by "dower," and the first by "morning-gift."

[3] BRUNNER, *Rechtsgeschichte*, I, 74.

reserved for the nuptials, when, often, it is paid, not to the guardian, but to the bride, disclosing to us the genesis of the dower. The *beweddung* is still a real contract, but not a contract of sale. Finally, even one-sided fulfilment is no longer required. Nothing is paid and nothing is transferred at the betrothal, which now consists of promises and sureties, accompanied by a solemn act which engendered the obligation. The real contract of sale has been transformed into a merely formal contract, which provides for future fulfilment on the part of both guardian and bridegroom.

Let us now turn to the second act in marriage, the *gifta*, or actual "giving" of the bride to the husband. Here there is no lack of ceremony and solemn phrases. Legally the *gifta* is a distinct transaction subsequent to the betrothal in the order of time.[1] Very generally in German lands late autumn or early winter was the favorite season for the celebration of marriages. So also, during the waxing moon, a Tuesday or a Thursday was preferred for the wedding day.[2] As among the Greeks, Romans, and Hindus,[3] the nuptial ceremony appears to have consisted of three parts: the solemn tradition, the joyous home-bringing of the bride, and the festal initiation into the wedded life in the bridegroom's house.[4]

[1] This is the view of SOHM, *Trauung und Verlobung*, 38–57; *Eheschliessung*, 89, 90, 100, 59 ff.; as opposed to FRIEDBERG, *Verlobung and Trauung*, 21 ff.; *Eheschliessung*, 21, 22, who thinks that the *Trauung* and *Verlobung* usually coincided. *Cf.* SCHROEDER, *Rechtsgeschichte*, 293; and DIECKHOFF, *Kirchliche Trauung*, 67, who agrees with Sohm.

[2] For very interesting details relating to the German *Trauung* see WEINHOLD, *Deutsche Frauen*, II, 362–413. The old English betrothal ceremonies are best described by ROEDER, *Die Familie bei den Angelsachsen*, 15 ff.

[3] HAAS, in WEBER'S *Indische Studien*, V, 327–29, 391–99. LEIST, *Alt-arisches Jus Gentium*, 133–71, gives a full discussion. *Cf.* above, chap. iv, pp. 171 ff.

[4] For the North Germans, LEHMANN, *Verlobung und Hochzeit*, 80–88; WEINHOLD, *Altnordisches Leben*, 243–52; and in general, *idem*, *Deutsche Frauen*, 368 ff., 406 ff., 399. The third part of the ceremony is the *Bettbeschreitung*, or bedding of the newly married pair. Normally this takes place in the bridegroom's house, as according to northern custom: LEHMANN, 85–87; but sometimes it appears to have taken place in the bride's home before the home-bringing: WEINHOLD, I, 399 ff. *Cf.* FRIEDBERG, *Eheschliessung*, 22, 45, 64.

Of these the *gifta*, or tradition, is most important, and it takes place in the home of the bride.[1] The father or guardian by blood takes the lead in the proceedings, and is thus the prototype of the modern priest or magistrate. The first act is the solemn surrender of the bride together with the symbols of the husband's power and protection: the sword, the hat, and mantle, or other objects of similar significance. Then, on reception of the bride, the bridegroom pays the *weotuma*, or delivers the charter providing for the morning-gift or other allowance for the widow; and, at the same time, makes symbolical assertion of the power which he thus acquires over the wife: for example, by treading upon her foot—a custom, says Sohm, which at later time finds a more refined expression in the delivery of a shoe or slipper.[2] From this arose the belief, still existing in some parts of Germany, that the bride will rule the family, if before the altar, after the blessing is pronounced by the priest, she places her foot upon that of the bridegroom. "Who carries the slipper rules."[3]

A point which requires special notice is the relative legal importance of the *beweddung* and the *gifta*. "Whether the marriage begins with the betrothal, or with the delivery of

[1] The nuptials of widows, according to Salic law, were an exception. These were, nominally, solemnized in the *mallum*, or open court; but in practice this requirement may not always have been observed. The exception seems to be an outgrowth of the original restriction on second marriage: TACITUS, *Germania*, c. 19; *Lex salica*, 44, *de reipus:* BEHREND, 57, 58. *Cf.* SOHM, *Eheschliessung*, 62–64 nn. 16, 17, 18; SCHROEDER, *Güterrecht*, I, 56. FRIEDBERG, *op. cit.*, 21; "Zur Geschichte," *ZKR.*, I, 366, led astray by the statement of GRIMM, *Rechtsalt.*, 433, that *Gemahl*, "husband," is derived from *mallum*, thinks the nuptials were usually celebrated in open court. On the derivation see SOHM, *op. cit.*, 62. In general on the marriage of widows see also HABICHT, *Altd. Verlobung*, 16–23; WEINHOLD, *Deutsche Frauen*, II, 40 ff.; SCHROEDER, *Rechtsgeschichte*, 293, 296; RIVE, *Vormundschaft*, I, 241; ZOEPFL, *Deutsche Rechtsgeschichte*, III, 3, 10, 11; WEINHOLD, "Reipus und Achasius," in HAUPT'S *Zeitschrift*, VII, 539 ff.; MÜLLENHOFF, "Glossary," in WAITZ, *Das alte Recht.*

[2] SOHM, *op. cit.*, 59–74.

[3] GRIMM, *op. cit.*, 142, 155, 156; WEINHOLD, *Deutsche Frauen*, I, 372. On the *gifta cf.* SCHMID, *Gesetze*, 630; FRIEDBERG, *Eheschliessung*, 21; WEINHOLD, *Altnordisches Leben*, 243 ff.

the bride to the bridegroom, or with their physical union, is one of the many doubtful questions."[1] According to the view of Sohm, which is defended with his usual acuteness, the betrothal of the early laws is not, as commonly held, a *pactum de contrahendo*, a contract for the future giving in marriage,[2] but the essential part of the marriage itself. It is the only declaration of will, the only ground of legitimate marriage, which is not created, but merely consummated at the *gifta*.[3] Those who are bound by contract are in respect to third parties practically husband and wife.[4] The ground of the husband's title is the betrothal and not the nuptials. Either party can bring action in the courts for breach of the contract. The bridegroom cannot compel the delivery of the bride, but he may sue for the recovery of the *weotuma* and an additional fine.[5] On the other hand, a breach of the contract by the bridegroom is punished by forfeiture of the *weotuma*, and possibly also by a fine.[6] The betrothal created the negative effects of marriage—the

[1] POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 363. Thus FRIEDBERG, *op. cit.*, 21, 22, regards "Verlobung, Trauung, und Beilager" as acts each of which is an element in the "joining in marriage"—all three "eheschliessende Vorgänge." *Cf.* SOHM, *Eheschliessung*, 88, 89; ZOEPFL, *Deutsche Rechtsgeschichte*, III, 5; SIEGEL, *Deutsche Rechtsgeschichte*, 455–57; KLEIN, *Das Eheverlöbniss*, 130 ff., who reviews the whole subject, citing authorities; and HANAUER, *Coutumes matrimoniales*, 255 ff.

[2] The views as to the legal "content" of the betrothal are summarized by HABICHT, *Altdeutsche Verlobung*, 30. RIVE, *Vormundschaft*, I, 243, holds that betrothal was not essential to a legal marriage; while PARDESSUS, *Loi salique* (Paris, 1843), regards it as legally requisite for a marriage, which, however, actually began only with the tradition of the bride.

[3] SOHM, *Trauung und Verlobung*, 139–47, *passim; idem*, *Eheschliessung*, 75–106.

[4] This is illustrated by the survival of names originally connected with the betrothal, but now with marriage itself: the English *wed*, *wedding*, *wedded wife*, etc.; the German *Gemahl* and *Gemählin;* the French *époux* and *épouse*, etc. SOHM, *Eheschliessung*, 78 n. 6, 56 nn. 74 and 75; *idem*, *Trauung und Verlobung*, 82, 83. But HABICHT, *Altdeutsche Verlobung*, 65–67, believes this argument not conclusive.

[5] *Poen. Theod.*, XVI: THORPE, II, 11: "reddatur ei pecunia quam pro ipsa dedit, et tertia pars addatur;" also in HADDAN AND STUBBS, *Councils*, III, 201; and WASSERSCHLEBEN, *Bussordnungen*, 216. The reading in *Conf. Ecgb.* is, "reddatur ei pecunia, quam pro illa dederat, et praeteria tertia pars hereditatis."—THORPE, II, 149; WASSERSCHLEBEN, 309. *Cf.* ÆLF., 18: THORPE, I, 73; YOUNG, in *Essays*, 169.

[6] INE, 31: THORPE, I, 123. Compare YOUNG, *loc. cit.*, 168, 169.

obligation of connubial fidelity. The bridegroom could maintain his title as a husband against all third parties. The *gifta* conveyed the positive rights, such as the power of the husband over the person and property of the wife. It is the completion of that which has gained its legal significance from the betrothal.[1]

The theory of Sohm has elicited much controversy.[2] It is clear that the ancient betrothal was of greater legal significance than the modern; but "on the other hand," to quote the judgment of Pollock and Maitland, "it seems too much to say that the betrothal was the marriage;" for the fulfilment of the contract could not be enforced. Moreover, they justly urge, we cannot be certain that betrothal by the "woman's father or other protector was essential to a valid marriage; we have to reckon with the possibility—and it is somewhat more than a possibility—of marriage by capture. If the woman consented to the abduction, then, according to the theory which the Christian church was

[1] SOHM, *Eheschliessung*, 75–106; *idem*, *Trauung und Verlobung*, 1–37, *passim;* YOUNG, *loc. cit.*, 167–69.

[2] His *Eheschliessung* (1875) called forth the *Verlobung und Trauung* (1876) of FRIEDBERG; also a critique by MEYER, in the *Jenaer Lit. Ztg.*, Jan., 1876, 501 ff. SOHM defends his position in *Trauung und Verlobung* (1876), 15 ff.; in his *Zur Trauungsfrage*, 11 ff.; and in the *Strassburger Festgabe für Thöl*, 84, 98 n. 27. The views of Sohm and others are examined by HABICHT, *Altdeutsche Verlobung* (1879), who concludes (75) that "Die Verlobung ist nicht Beginn der Ehe, aber die rechtliche Grundlage und nothwendige Voraussetzung derselben." The *Trauung* is "fulfilment of the betrothal" and "constitutes the beginning of the marriage." LEHMANN, *Verlobung und Hochzeit* (1882), examines the problem from the standpoint of northern law, and reaches the analogous result (124, 125) that the "betrothal is a primary and independent, the nuptials (*Hochzeit*) a secondary and dependent, act for joining in marriage (*Eheschliessungsact*); the betrothal is the real *Eheschliessungsact*, the nuptials an *Ehevollziehungsact.*" Sohm's view is adopted by SPIRGATIS, *Verlobung und Vermählung*, 4 f.; it is attacked by SCHEUEL, *Kirchliches Eheschliessungsrecht*, 35 ff.; it is regarded as extreme (*übertrieben*), though in spirit right, by SCHUBERT, *Die evangelische Trauung*, 15 n. 2; LOENING, *Gesch. d. deut. Kirchenrechts*, II, 581, 600 n. 1; both betrothal and tradition are essential to a German marriage according to SEHLING, *Unterscheidung der Verlöbnisse*, 30; while HEUSLER holds that neither betrothal nor tradition, but the *copula carnalis*, is the essential point: *Institutionen*, II, 284. *Cf.* KLEIN, *Das Eheverlöbniss*, 130–34; SCHROEDER, *Rechtsgeschichte*, 296, 297, and authorities there cited; and DIECKHOFF, *Kirchliche Trauung*, 66, 67, note, 97, who favors and summarizes Sohm's view.

gradually formulating, there would be all the essentials of a valid marriage, the consent to be husband and wife and the sexual union."[1]

II. RISE OF FREE MARRIAGE: SELF-BEWEDDUNG AND SELF-GIFTA

Already in the eleventh century the forms of marriage were entering upon another stage. It is possible, in the historical period, as already seen, that a valid marriage could arise in abduction, through subsequent payment of a fine; and it is not impossible that side by side with wife-purchase the custom of free marriage by simple agreement of the parties may have existed, as we have found it existing among other peoples. But the practice could not have been widely extended, and it may imply merely the indulgence or silent consent of the legal protector.[2] Hitherto, so far as the positive provisions of the law-books are concerned, betrothal by the natural guardian or his representative[3] had been essen-

[1] POLLOCK AND MAITLAND, II, 368. *Cf.* DARGUN, *Mutterrecht und Raubehe*, 23 ff. Besides the normal or full marriage of free men and women, just described, the law-books recognize concubinage, so-called "marriages" between the unfree, and unions between the free and the unfree. The church, by giving them a sacramental sanction, constantly strove to raise these irregular connections to the rank of genuine wedlock. See especially KOEHNE, "Die Geschlechtsverbindungen der Unfreien," in GIERKE'S *Untersuchungen*, XXII, 1–23; and the literature on the subject mentioned in the Bibliographical Note at the head of this chapter.

[2] That free marriage sometimes occurred is, of course, a conjecture. But see DARGUN, *Mutterrecht und Raubehe*, 24 ff.; and KOHLER, in *ZVR.*, VI, 321, for the alleged survival of marriage *ohne Mundium*, which they assume to be a survival of *Mutterrecht*. This assumption, of course, is doubtful. *Cf.* UNGER, *Die Ehe*, 105, 106. See chap. iv, above.

[3] "So long as marriage was a strictly civil [lay] ceremony, as well as a purely civil engagement, the bride's father or guardian performed the rite. It was he who took her by the neck and shoulders, and gave her to the bridegroom. He gave the symbolic shoe. In the Danish matrimonial rite of a subsequent period the father's part was even more impressive. In language, never in later times permitted to our English clergy, he declared himself the actual maker of the marriage, when, on hand-fasting the bride and groom, he said to the latter, 'I join this woman to you in honour to be your wife, with a right to half of your bed and keys, and to a third of your goods acquired or to be acquired, according to the law of the land and St. Eric. In the name of the Father, and of the Son, and of the Holy Ghost.'"—JEAFFRESON, *Brides and Bridals*, I, 53. *Cf.* on the Danish "hand-fasting" BRAND, *Popular Antiquities*, II, 87, 88; BULLINGER, *Christen State of Matrimonye*, 43.

tial to a valid contract. Originally the father could betroth his daughter even against her will.[1] But, just as the guardianship of the husband as respects the wife's property gradually becomes transformed into a merely formal guardianship or judicial control,[2] so the power of the father is first weakened by granting the daughter a veto on the choice of a bridegroom; that is, by making her consent necessary to a binding contract; and then, presently, the relations of guardian and ward are entirely transposed: self-betrothal by the daughter constitutes a valid contract, while the father is allowed only a veto power. Naturally it was the widow, in the case of a second marriage, who first succeeded in emancipating herself from tutorial control. Among the Germans in the time of Tacitus it was against popular usage, if not illegal, for a widow to marry again.[3] But in the folk-laws she appears on practically the same footing as a girl in this regard;[4] and placed as she was "between two families," with the "possibility of recourse to her own kindred" in case her first husband's relatives as possessors of the *mund* over her refused their assent to a second marriage, she soon succeeded in freeing herself entirely from such restraints.[5]

Canute forbids the marriage of a maiden against her

[1] SOHM, *Eheschliessung*, 50; *cf.* LEHMANN, 13.

[2] "Processvormundschaft": SOHM, *op. cit.*, 52.

[3] TACITUS, *Germania*, cc. 18, 19.

[4] These codes sometimes fixed a term within which a widow may not marry, but a second marriage is treated as entirely legal: *Lex salica*, c. 44: BEHREND, 57-59; *Lex saxonum*, tit. vii, 3, 6: WALTER, *Corp. juris germ.*, I, 387; *Lex wisigothorum*, lib. iii, tit. 2, c. 1, tit. 4, c. 2, 7: WALTER, I, 470, 471, 477, 478; *Lex burgund.*, tit. 24, c. 1, tit. 52: WALTER, I, 316, 330; *Edictum Rotharis*, cc. 178, 182, 188: WALTER, I, 710, 711, 714; ÆTHELBERHT, 76; ÆTHELRED, V, 21; CANUTE, 73, 74: SCHMID, *Gesetze*, 8, 224, 310, 312. *Cf.* HABICHT, *Altd. Verlobung*, 16 ff.; SOHM, *Eheschliessung*, 63, who differ as to the interpretation of the much-disputed c. 44, *lex sal. de reipus;* GRIMM, *Rechtsalt.*, 452; SCHROEDER, *Güterrecht*, I, 56, 57.

[5] HABICHT, *Altdeutsche Verlobung*, 26, 27. The Saxon and Lombard laws allow the widow to appeal to her own family in case her legal tutor — that is, her deceased husband's family — will not consent: HABICHT, 17, 18. On the freedom of the English widow see ROEDER, *Die Familie bei den Angelsachsen*, 26 ff.

will.[1] If consent of father or guardian be not obtained, the betrothal is still binding, but the daughter may be punished by loss of inheritance. Thus early do we find the beginning of the private marriages, which subsequently, under the names of "irregular" or "clandestine," played so great a rôle in the history of matrimonial law.

The form of contract observed in self-betrothal is usually the *wed*, sealed by the *Handschlag* or hand-fasting. The "real contract" through payment of the *arrha* is, however, also retained; but the *arrha* is paid, not to the guardian, but to the bride, and appears most frequently in the form of the ring, so well known to us as the betrothal or "engagement" ring.[2] The ring had been used by the Romans as *arrha;* and, like the bridal wreath and the bridal veil, it seems to have been borrowed from them by the Germans.[3]

[1] CANUTE, II, 75: "and let no one compel either woman or maiden to him whom she herself mislikes, nor for money sell her; unless he is willing to give anything voluntarily."—THORPE, I, 417. For the similar provisions of Gothic and Lombard law see HABICHT, 23 ff.

[2] SOHM, *Eheschliessung*, 54. Sohm's theory of self-betrothal and self-*Trauung* is criticised by FRIEDBERG, *Verlobung und Trauung*, 9, 11 ff. In general see SPIRGATIS, *Verlobung und Vermählung*, 6 ff.; HEUSLER, *Institutionen*, II, 286; and with SOHM'S *Eheschliessung*, as below cited, compare his *Zur Trauungsfrage*, 12 ff.

[3] The ring is mentioned as *arrha* in *Dig.*, xiv, tit. iii, 5, § 15; xix, tit. i, 11, § 6: *Corpus juris civ.*, I, 189, 244. *Arra* appears in connection with *sponsalia*, *Dig.*, xxiii, tit. ii, 38: *Corpus juris civ.*, I, 297. *Cf.* SMITH, *Dict. Greek and Roman Ant.*, I, 193; LUDLOW, in *Dict. Christ. Ant.*, I, 142 ff.; BABINGTON, *ibid.*, II, 1807–9; MEYRICK, *ibid.*, 1105. Originally, we are told, the Roman lover presented his betrothed a plain ring of iron, in later days of gold, but did not receive one in exchange: FRIEDLÄNDER, *Sittengeschichte*, I, 456; KULISCHER, in *ZFE.*, X, 210. On the *annulus pronubus* and its acceptance by the Germans see JUNIUS, *De annulo romanorum;* MÜLLER, *De annulo pronubo;* HOFMANN, *Verlobungs- und Trauring*, 829 ff.; SIEGEL, *Deutsche Rechtsgeschichte*, 451; WEINHOLD, *Deutsche Frauen*, I, 343; BINGHAM, *Orig. Ecc.*, VII, 311, 313–16, 337, 339; HOWLETT, in ANDREWS'S *Curious Church Customs*, 105, 107–9; FRIEDBERG, *Eheschliessung*, 26 n. 3; SOHM, *Eheschliessung*, 54, 55.

In the marriage ceremony of the Greek church two rings are used, one of silver and one of gold; see ritual for espousals in the eastern church in BURN, *Parish Registers*, 141, 142; and in BINGHAM, *The Christian Marriage Ceremony*, 214 ff., 219; and *cf.* ZHISHMAN, *Das Eherecht der orientalischen Kirche*, 691; and MEYRICK, in *Dict. Christ. Ant.*, II, 1105. The betrothal ring appears among the Slavs: POST, *Familienrecht*, 236. In mediæval England "a rush ring was supposed to possess some peculiar charm. Richard Poore, bishop of Salisbury, in his *Constitutions*, anni 1217, forbids the putting of *rush rings*, or any the like matter, on women's fingers, in order to the debauching them more readily," and he insists that some people

On the other hand, though there can be little doubt of the historical connection of the betrothal ring and its duplicate, the wedding ring, with the *arrha*,[1] whether or not it may be regarded as a surviving symbol of the former servitude of the wife must depend upon the acceptance or rejection of the view that the actual sale-marriage, as opposed to the transfer of the *mund*, ever existed among the Teutonic peoples. "A favorite theory," says Henry Adams, "has insisted upon regarding the wedding ring as a badge of servitude or a symbol of purchase. This idea cannot be maintained. The wedding ring appears in its origin to have been merely the earnest money which bound the contract of marriage between the father and the husband, and was not the only symbol of the kind in early custom, although no other survives in modern use. The ring proved,

thought that "what was thus done in jest was a real marriage": BURN, *op. cit.*, 143. *Cf.* DOUCE, *Illustrations of Shakespeare*, I, 315–19; WOOD, *The Wedding Day*, 232, 233, 241. On the various uses and symbolism of the ring among the Teutonic peoples read the lecture of HODGETTS, *Older England*, 125–57; and a valuable general treatise on the ring is JONES'S *Finger Ring Lore* (London, 1890). TEGG, *The Knot Tied*, 309–37, has two chapters on the marriage ring; throughout WOOD'S *The Wedding Day in all Ages and Countries* much information on the subject will be found; and there is an interesting passage in SWINBURNE, *Of Spousals*, 207–9, quoted below, with other references, chap. vii, sec. 1.

The kiss at betrothal appears to have been borrowed by the Christians from older pagan custom, and it was first given legal importance by Constantine. If the kiss were given, he provided that, in case one of the parties died before the nuptials, the other party was entitled to inherit half the espousal donations: *Cod. Theod.*, lib. iii, tit. 5, leg. 5; *Cod. Just.*, lib. v, tit. 3, leg. 16: *Corpus. juris civ.*, II, 194. TERTULLIAN, *On the Veiling of Virgins*, chap. 11: *Ante-Nicene Faths.*, IV, 34, mentions the betrothal kiss as a heathen custom. *Cf.* VENABLES, in *Dict. Christ. Ant.*, II, 905, 906; BINGHAM, *Orig. Ecc.*, VII, 316; V, 75; WEINHOLD, *Deutsche Frauen*, I, 343, 344. In England the priest joined in the ceremony of kissing at the nuptials. "In the Articles of Visitation in the diocese of London in 1554 is the following, 'Item, whether there be any that refuseth to kysse the Prieste at the solempnization of matrimony, or use any such lyke ceremonies heretofore used & observed in the Churche'": BURN, *op. cit.*, 143; *cf.* DOUCE, *Illustrations of Shakespeare*, I, 112, 403; WOOD, *The Wedding Day*, Index.

[1] See especially the careful monograph of HOFMANN, *Ueber den Verlobungs- und Trauring* (Vienna, 1870); and compare FRIEDBERG, "Zur Geschichte der Eheschliessung," *ZKR.*, I, 370 n. 34, 372 n. 41; SPIRGATIS, *Verlobung und Vermählung*, 16, 17; THRUPP, *The Anglo-Saxon Home*, 48 n. 50. Dogmatic writers, of course, see in the ring an alleged Christian symbolism: *cf.* BRISSONIUS, *De ritu nuptiarum*, 3 ff.; KLEE, *Die Ehe*, 127–29; GÖSCHL, *Darstellung der kirchlich-christlichen Ehegesetze*, 183 ff.; DIECKHOFF, *Die kirch. Trauung*, 28, 29.

not that marriage was a sale, but that marriage was a civil contract executed according to the strict formalities of contracts in the primitive law; it proved, not that women were deprived of rights, but that their rights were secured to them in marriage by the most careful provisions known to early society."[1] This is, of course, a very emphatic statement of one side of the case; and it should not be overlooked that the ring may stand as a symbol of equitable contract; and yet the *arrha*, which the ring is, may mark but the intermediate stage in the evolution of the betrothal from the ancient process of actual sale. Nor does the connection of the betrothal ring with the Roman and German *arrha* necessarily exclude other historical associations. Kulischer,[2] for instance, traces its origin to wife-capture. Like the betrothal band or thread, which sometimes appears with it or in its place, he believes that the ring symbolizes the fetters with which the captive maid was bound. But the evidence to support this theory is not conclusive.[3] The practice of exchanging rings, of giving a ring to the bridegroom as well as to the bride, did not arise until the later

[1] ADAMS, "Primitive Rights of Women," *Hist. Essays*, 35.

[2] KULISCHER, "Intercommunale Ehe durch Raub und Kauf," *ZFE.*, X, 208-10.

[3] The proof consists in the interpretation of the supposed symbolism. Thus the German lover, in early times, placed upon the bride's finger a ring made of a twig plucked from a tree upon his own land, the bride thus being "symbolically bound to the new locality": UNGER, *Die Ehe*, 106. The thread or band is interpreted as the bond of the captive; and Kulischer gives the following illustration from northern custom:

"Komm, komm Maria lieb, und reich mir deine Hand,
Hier hast du das Ringelein und um den Arm das Band,"

runs a Swedish rhyme. In an Upland dance, the maiden sings:

"Und willst mich schliessen an's Herz dein,
Sollst mir zuvor geben ein Ringelein."

To which the young man replies:

"Hier hast du Ring und Verlobungsband,
Du sollst mich nicht betrügen."

Sometimes these symbols are brought into connection with the sword—also, it is assumed, a survival of violence. Thus in an Anglo-Saxon picture of the eighth century the bridegroom reaches to the bride the ring upon a sword or staff: KULISCHER, 209; *cf.* WEINHOLD, *Deutsche Frauen*, I, 241 ,242.

Middle Ages.[1] In England the drinking of a cup of wine and the breaking of a gold piece between the bride and bridegroom appear as forms of the *arrha*.[2] Naturally after the *arrha* is paid to the bride it becomes confused with the *wed*, and soon all distinction between the two forms of contract is lost. "Indeed at an early day the arrha was called a wed, and it was legally indifferent whether the oath, handfasting or other wed, or the ring or penny[3] were used. Therefore the ring and penny are found in conjunction with the glove; that is, with a real wed. And it is especially of interest that the English language still calls marriage a wedding, and that in England the ring (that is the arrha) is still used to wed the bride."[4]

Simultaneously with the rise of self-betrothal, the bride gained also the right of self-*gifta*. The parties might conduct the ceremony themselves.[5] But in place of the natural guardian, who originally possessed the sole legal right to officiate at the tradition of the bride, appears often a "chosen guardian," selected by the bride or by the betrothed couple. The person thus selected may be the father or other relative of the bride, or any third person whatever.[6] Moreover, in the marriage rituals of the eleventh century[7] an *orator* or *Fürsprecher* appears, who acts as an "assistant" to the natural guardian, dictating the solemn phrases of the ritual and guiding the whole proceeding. Friedberg regards the orator as the predecessor of the priest, and thus, of course, of

[1] WEINHOLD, *op. cit.*, 343; SCHROEDER, *Rechtsgeschichte*, 700, note; SIEGEL, *Deutsche Rechtsgeschichte*, 453, who ascribes the practice to the imitation of the court manners. Even now in the English ceremonial only the bride receives a ring, consistently with its origin in the *arrha*. *Cf.* FRIEDBERG, *op. cit.*, 38, notes.

[2] FRIEDBERG, *op. cit.*, 42, 43; SOHM, *Eheschliessung*, 54; *cf.* ROEDER, *Die Familie bei den Angelsachsen*, 30 ff.

[3] That is, forms of the *arrha*.

[4] SOHM, *Eheschliessung*, 56; *cf.* MAX MÜLLER, *Essays*, II, 251.

[5] FRIEDBERG, *op. cit.*, 25.

[6] SOHM, *op. cit.*, 67 ff.

[7] *Ibid.*, 67, and the Italian ritual of the eleventh century in *Anhang*, II, 318, 319.

the civil magistrate as conductor of the nuptial ceremony.[1] But Sohm has shown that the functions of the priest or magistrate grew out of those of the "chosen guardian," and that the "*Trauung* by a *Fürsprecher* is in itself a contradiction." The latter is "never an actor, but always an aid to the actor. He has in truth only to speak, nothing to do."[2] While thus theoretically there is a great difference between the orator and the chosen guardian, and both could, and probably did, for a time participate in the same ceremony, still the practical result is in accordance with the view of Friedberg. For if, as Sohm has shown, the motive for the creation of the institution of orator was the fact that the elaborate phrases of the old rituals were rapidly passing from the memories of the people, and it was necessary to call in a lawyer or other person skilled therein to assist the parties,[3] it is certain that the chosen guardian, whether layman or priest, soon satisfied this necessity, and ultimately inherited the functions of the orator.[4]

From about the beginning of the thirteenth century self-*gifta* was the only form of nuptials; and an important result of the custom was the gradual omission of the solemn symbols, such as the giving of the sword, hat, or mantle, indicative of the transfer of the powers of guardianship. The tradition of the bride was no longer a real tradition. The *gifta* had become a simple oral declaration of union.[5] Besides this modification of the ceremony is another, both of which have been retained to our own times. "We often find that the chosen guardian not only gives the bride to the bridegroom, but likewise the bridegroom to the bride;

[1] FRIEDBERG, *op. cit.*, 25 ff., 93 ff., 62.

[2] SOHM, *op. cit.*, 71 ff., 166 n. 31. The *Fürsprecher* or *orator* here mentioned, in accordance with the view of Sohm, must not be confused with the *forespreca* of the old English formulary above quoted; the latter was the guardian himself or a representative—a *Processvormund:* SOHM, 72.

[3] SOHM, *op. cit.*, 67.

[4] SOHM, *ibid.*, 166 n. 31, concedes this.

[5] A *Zusammensprechen:* SOHM, *op. cit.*, 73.

because, in reality, he occupies the same position in regard to each, that is a position implying no power."[1] Thus the marriage is no longer a surrender of the power of the guardian and a transfer of the same to the bridegroom, but only the expression of a mutual gift.[2]

Self-*gifta* and the practice of choosing a third party to assist the bride has an important bearing, as already intimated, on the development of the functions of the clergy in the marriage celebration. But before discussing this point it is desirable to notice another fact essential for a proper understanding of the present forms of solemnization. From the eleventh century onward it became customary in Europe to repeat the ceremony of betrothal, or "spousals," at the nuptials. The rituals which have been preserved are divided into two parts. "The first part contains a formal contract of betrothal with the guardian (*Vogt*) of the bride in the form of a wed. The second part contains the *Trauung* through the solemn surrender of the bride by the guardian."[3] This remarkable dualism is the most striking feature of the present marriage service of the English church,[4] which is derived through the liturgies of Elizabeth and Edward VI.[5] from the most ancient manuals, particularly those of Here-

[1] *Ibid.* [2] A *Zusammengeben: ibid.* [3] *Ibid.*, 100 ff.

[4] See the ritual in BINGHAM, *The Christian Marriage Ceremony*, 163, 164; TEGG, *The Knot Tied*, 10 ff.; MOORE, *How to Be Married*, 27 ff.

"This first part of the office was anciently termed the espousals, which took place some time before the actual celebration of marriage. The espousals consisted in a mutual promise of marriage which was made by the man and woman before the bishop or presbyter and several witnesses; after which articles of agreement of marriage (called *tabulae matrimoniales*), which are mentioned by Augustine, were signed by both persons. After this the man delivered to the woman the ring and other gifts, an action which was called *subarrhation*. In the later ages the espousals have always been performed at the same time as the office of matrimony, both in the western and eastern churches; and it has long been customary for the ring to be delivered to the woman after the contract has been made, which has always been in the actual office of matrimony."—PALMER, *Origines liturgicae* (1839); quoted also by JEAFFRESON, *Brides and Bridals*, I, 68, who in his chapter on "Espousals" (*op. cit.*, I, 60–87) gives much information relating to ancient betrothal customs. *Cf.* BRAND, *Popular Antiquities*, II, 87–98 (betrothal customs).

[5] *Liturgies of Edward VI.*, 128, 129; *Liturgies of Elizabeth*, 218, 219.

ford, Durham, Sarum, and York. The betrothal comes first, and it is always a contract in words of the future tense, corresponding to the *sponsalia per verba de futuro* of the canonists, which will again be referred to. In the York service, for example, the priest says to the man: "Wylt thou have this woman to thy wyfe?" and to the woman: "Wylt thou have this man to thy husbande?" Each party answers: "I wyll." Then takes place the solemn tradition, or giving of the bride to the bridegroom, who says, in words of the present tense: "Here I take thee N. to my wedded wyfe;" and the woman responds in the same formula: "Here I take thee N. to my wedded husbande."[1]

But the repetition of the betrothal is of no legal significance, save as a guaranty of the existence of a contract before the actual union. It is a "declaratory" act, a mere confession of betrothal. As a result of the repetition there soon arises an entire confusion in the symbols. In a Suabian ritual of the twelfth century the guardian delivers to the bridegroom "not only the sword, hat, and mantle, that is, symbols of the *gifta*, but also the *wette* or wed, the ring and penny, that is, symbols of the betrothal. Thus the

[1] See the "Ordo ad facienda sponsalia," in the *Manuale et processionale ad usum insignis ecclesiae eboracensis:* Surtees Society *Publications*, LXIII, 26, 27. The double ceremony also appears in the Sarum or Salisbury manual: MASKELL, *Monumenta ritualia*, I, 56, 57: Surtees Society *Publications*, LXIII, Appendix, 18, 19; in the ritual of Hereford; that of the twelfth century contained in a Pontifical of the library of Magdalen College, Oxford; in that of the missal of Hanley Castle, Worcestershire, dating from the thirteenth century; and in that of the fifteenth century in the Harleian MS., No. 2860, British Museum; that of a Welsh manual of the same century, in the library of the dean and chapter of Hereford; while it is plainly discernible in the ritual of the twelfth century contained in the Ely Pontifical of Cambridge University library; and that of the Pontifical of Anianus, bishop of Bangor, 1268-1304: all printed in Surtees Society *Publications*, LXIII, Appendix, 116, 155-69. *Cf.* the rituals printed by DIECKHOFF, *Kirchliche Trauung*, 73, 77, 89 ff.; and the Roman marriage service in BINGHAM, 177, 178, where the dualism appears; but in the ritual of Paul V. it is not retained, unless the subsequent giving of the ring may be regarded as the second part. The priest says: "M. vis accipere N. hic praesentem in tuam legitimam uxorem?" or "tuum legitimum maritum?" and on receiving the answer, "Volo," proceeds: "Ego conjungo vos in matrimonio": *Rituali romanum Pauli Quinti* (Rome, 1816), 199 f. See the discussion of the contents of the early rituals in chap. vii, below.

bridegroom in the ring and penny, instead of paying, actually received the remnants of the old purchase price of the wife."[1]

In our own civil-marriage ceremonies, where the dualism does not usually appear, the responses of the parties, the "Yes," "I do," or "I will," are nothing more than the survival of the ancient private betrothal, now recognized by law as the only essential parts of the nuptial ceremony; while the wedding ring is merely a duplicate of the betrothal or engagement ring, both being the survival of the *arrha* and, therefore, of the ancient purchase price of the bride.[2]

The primitive and mediæval marriage whose development has thus been traced to the thirteenth century was not "civil" marriage in the strict sense of the word; that is, a marriage contracted under sanction of the civil authority, as opposed to one solemnized by authority of the church and according to ecclesiastical forms.[3] It was a civil marriage only as being a lay marriage. There is no trace of any such thing as public license or registration; no authoritative intervention of priest or other public functionary. It is purely a private business transaction. Either the guardian gives away the bride and conducts the ceremony; or else the solemn sentences of the ritual are recited independently by the betrothed couple themselves. These formalities and the presence of the friends and relatives[4] are the only means of

[1] SOHM, *Eheschliessung*, 101 ff. The text of this extremely interesting marriage ritual is printed in FRIEDBERG, *Eheschliessung*, 26, 27; and in SOHM, *Anhang*, III, 319, 320. For a description of these early rituals see WEINHOLD, *Deutsche Frauen*, I, 340-48.

[2] SOHM, *op. cit.*, 105 n. 70. On the ring in English rituals see FRIEDBERG, *op. cit.*, 38, note, 46, 47.

[3] *Ibid.*, 30.

[4] TACITUS, *Germania*, 18: "intersunt parentes ac propinque." It was customary in the Middle Ages for the assembled friends to form a circle—*Ring*—about the betrothed couple during the ceremony. Publicity was made a legal requirement by Pippin: WALTER, *Corpus juris*, II, 42. FRIEDBERG, *op. cit.*, 24 n. 4, gives also references to mediæval poems. He regards the practice of inviting a large number of friends as originating in the desire to secure publicity. Particular cities passed laws requiring the presence of witnesses; for example, Prague.

publicity, the only substitute for the modern cognizance of the state.[1] Rights and obligations growing out of the marriage contract are enforced in the local or national courts just as other civil rights and obligations are enforced. Only gradually was the ancient usage in this regard superseded. Slowly but firmly was the exclusive jurisdiction of the church in matrimonial causes established. Spiritual courts and the canon law came into existence. In England after the Norman Conquest the removal of ecclesiastical suits from the temporal to the new church tribunals led eventually to serious evils. With the Reformation the way was open for the intervention of the civil power. Beginning in Holland and America, the state has claimed her right to control the marriage celebration and the administration of matrimonial law as being of vital interest to society. How this came to pass will be explained in the following chapters.

[1] Except the publication of banns hereafter mentioned.

CHAPTER VII

RISE OF ECCLESIASTICAL MARRIAGE: THE CHURCH ACCEPTS THE LAY CONTRACT AND CEREMONIAL

[Bibliographical Note VII.—For the original Christian usage the writings of the early Fathers are of primary interest, and an English version of them is available in *The Ante-Nicene Fathers* (Buffalo, 1885–87), edited by Roberts and Donaldson and revised by A. C. Coxe. An indispensable handbook and bibliographical guide for the study of this subject, as well as for a multitude of questions connected with the first eight centuries of Christian history, is Smith and Cheetham's *Dictionary of Christian Antiquities* (London, 1875–80), particularly Meyrick's article, "Marriage," and Ludlow's clear and thoroughly critical discussions of the "Benediction," "Betrothal," and "Arrhae." Important sources for this chapter are also the *Corpus juris civilis* (Berlin, 1872), edited by Krüger and Mommsen; Richter and Friedberg's *Corpus juris canonici* (Leipzig, 1881–); Haddan and Stubbs's *Councils and Ecclesiastical Documents* (Oxford, 1869–78); Wilkins's *Concilia* (London, 1736–37); Gee and Hardy's *Documents* (London 1896); Glanville's *Tractatus*, in Vol. II of Phillips's *Reichs- und Rechtsgeschichte* (Berlin, 1827–28); and with these may be used to advantage Johnson's *Collection of the Laws and Canons of the Church of England* (London, 1850). On marriage at the church door, *The Old English Homilies* (London, 1868); Gregory's *Pastoral Care* (London, 1871); Hengham's *Summa parva* (London, 1737); Horne's *Mirror of Justices* (ed. Whittaker, London, 1895); Fitzherbert's *New Natura Brevium* (Dublin, 1793); as well as Fleta, Britton, and Bracton, have furnished illustrative passages.

The evolution and character of the celebration are best seen in the marriage rituals themselves. For the European practice in general, including the English rites, consult the second book of Selden, *Uxor ebraica* (Frankfort on the Oder, 1673); or the same in Vol. II (III, as bound) of his *Opera omnia* (London, 1726); and the first book of Martene, *De antiquis ecclesiae ritibus* (Antwerp, 1763-64), in both of which works a large number of rituals, with a mass of other useful materials, will be found. Some portions of Martene are extracted by Michelet in chap. ii of his *Origines du droit français* (Paris, 1857); and many rituals, both of the East, and the West, are epitomized in Palmer, *Origines liturgicae* (3d ed., Oxford, 1839), the use of which is facilitated by Beal,

Analysis of Palmer's Orig. Lit. (Cambridge, 1856). Some of the earliest Christian *sacramentaria*, the eleventh-century ritual of Rennes, and various other mediæval *ordines* are republished by Dieckhoff, *Die kirchliche Trauung* (Rostock, 1878). Sohm, *Eheschliessung*, gives the Rennes service above named, as well as those mentioned in Bibliographical Note VI; and the principal parts of the twelfth century "Pontifical ou rituel de lire" are quoted by Léon Gautier in his fascinating book *La chevalerie* (Paris, 1884), where may be found the best and most detailed account existing of the rites and social usages connected with a mediæval French marriage. Most important of all for the present purpose, however, are the ancient English liturgies. That of Sarum (Salisbury) is published by Maskell, *Monumenta ritualia ecclesiae anglicanae* (Oxford, 1882), with the essential clauses of the York service in the margin; while the rituals of Salisbury, York, and Hereford, together with extracts from ten other marriage services, ranging all the way from the eighth to the fifteenth century, are contained in Vol. LXIII of the Surtees Society *Publications* (London, 1875). With these may be compared the Catholic forms in the *Rituale romanorum Pauli Quinti* (Rome, 1816); and those of the Reformation in the *Liturgies of Edward VI.* (Cambridge, 1844); and the *Liturgies of Elizabeth* (Cambridge, 1847), both in the publications of the Parker Society. The earlier of these may also be found in the "First" *Book of Common Prayer*, 1549 (exact reprint, black letter, London, 1844); or in the "Second" *Book of Common Prayer*, reprinted in the same style at London in the same year. With these collections will be found useful Lathbury, *History of the Book of Common Prayer* (2d ed., Oxford and London, 1859); and Daniel, *The Prayer Book* (London, 1877). The marriage rituals of the modern Greek, Roman, and English churches are given in Bingham (J. F.), *The Christian Marriage Ceremony* (New York, 1871); and the English service, with discussion, may also be found in Tegg, *The Knot Tied* (London, 1877); and Moore, *How to Be Married* (London, 1890).

The principal sources for the study of the Council of Trent are Richter-Schulte, *Canones et decreti concilii tridentini* (Leipzig, 1853); Theiner, *Acta genuina concilii tridentini* (Zagrabrae, Croatiae, 1874); Father Sarpi (Pietro Soave Polano), *Historie of the Council of Trent* (London, 1620), opposing the action of the Council; and his antagonist Pallavicino, *Istoria del Concilio di Trento* (Rome, 1833); or the Latin version of the same by Giattino (Antwerp, 1670). A convenient collection on this subject is Waterworth, *Canons and Decrees of the Council of Trent* (New York, 1848); while valuable monographs are Salis, *Die Publikation des tridentinischen Rechts der Eheschliessung* (Basel, 1888); Leinz, *Die Ehevorschrift des Concils von Trient* (Freiburg, 1888); Fleiner, *Die tridentinische Ehevorschrift*

(Leipzig, 1892); and Meurer, "Die rechtliche Natur des trid. Matrimonial-Decrets," in *ZKR.*, XXII (Freiburg, 1889). The action of the Council is treated in Esmein, *Le mariage en droit canonique* (Paris, 1891); Madan, *Thelyphthora* (London, 1781); Bohn, *Political Cyclopœdia* (London, 1860); as also by Sohm and Friedberg. Froude's *Lectures on the Council of Trent* (New York, 1896) are too general to be of value for the present subject.

For the great case of Regina *v.* Millis, historically so surprising, the *Report of the Cases of Regina v. Millis et Regina v. Carroll in the Queen's Bench, Ireland* (Dublin, 1842); and 10 Clark and Finnelly, *Reports of Cases Decided in the House of Lords*, are indispensable. In connection therewith read Sir John Stoddart, *Observations on the Opinion* (London, 1844); his *Letter to Lord Brougham* (London, 1844); and Elphinstone's paper in the *Law Quarterly Review*, V (London, 1889). To supplement these may be consulted the Jesuit Sanchez's treatise, *Disputationum de matrimonii sacramento* (Venice, 1625); the older handbook of Lyndwood, *Provinciale* (n. p., 1505; or Oxford, 1779); and, in general, Bishop, *Marriage, Divorce, and Separation* (Chicago, 1891); Stephens, *Laws of the Clergy* (London, 1848); Reeves, *History of the English Common Law*, IV; Bright, *Husband and Wife* (New York, 1850); the concise and accurate discussion of Pollock and Maitland, *History of the English Law*, II; and the masterly investigation of Friedberg in his *Eheschliessung*. For the more celebrated earlier cases with which the judgments in the Queen *v.* Millis are not in harmony see 1 Roll, *Abridgement*, 353 (Foxcroft's case, *ca.* 1282); Year Book 34 Edward I. (Delheith's case, 1305); 2 Haggard, *Consistory Reports*, 54–137 (Dalrymple *v.* Dalrymple, 1811); 2 Coke's *Reports*, 355–59 (Bunting *v.* Lepingwell); especially the numerous decisions in Hale's unique *Precedents and Proceedings in Criminal Causes, 1475–1640* (London, 1847); and compare the later case of Beamish *v.* Beamish, 1859–61, in Clark, 9 *House of Lords Cases* (Boston, 1871), which follows the precedent in Queen *v.* Millis, giving a history of matrimonial laws from Anglo-Saxon times. On this decision there is a very instructive passage in Pollock, *First Book of Jurisprudence* (London, 1896). On Dalrymple *v.* Dalrymple consult Dodson's *Report of the Judgment of Sir William Scott* (London, 1811). See further the note at the close of this chapter.

At the head of all scientific historical writers on the rise of ecclesiastical marriage is Sohm whose main thesis, that the early canon law of the marriage contract rests on the principles of German custom, has fairly withstood the test of criticism. His principal work on this subject, *Eheschliessung*, elsewhere mentioned, is supplemented by the *Zur Trauungsfrage* (Heilbronn, 1879), and the *Obligatorische Civilehe* (Weimar, 1880); and in these he has proved beyond reasonable doubt that the *legal* participation of the church in the nuptial celebration is

of late origin. Agreeing with Sohm in his main conclusion, but differing on some questions, is Schubert, *Die evangelische Trauung* (Berlin, 1890); and he is in part anticipated by Biener in the much earlier "Beiträge zu der Geschichte der Civilehe," in *Zeitschrift für deutsches Recht und Rechtswissenschaft*, XX, 119–44 (Tübingen, 1861). He is stoutly opposed on all the main points in Sehling's able monograph, *Die Unterscheidung der Verlöbnisse im kanonischen Recht* (Leipzig, 1887); and also, especially regarding the late origin of the legal ecclesiastical celebration, by Dieckhoff in the work already mentioned, as also in his *Civilehe und kirchliche Trauung* (Rostock, 1880); Moy, *Eherecht der Christen* (Regensburg, 1833), had already taken the same view; Scheurl holds a medial position in "Consensus facit nuptias," *ZKR.*, XXII, 269–86 (Freiburg, 1889); which paper was preceded by his *Entwicklung des kirchlichen Eheschliessungsrechts* (Erlangen, 1877), and the "Zur Geschichte des kirch. Eheschliessungsrechts," *ZKR.*, XV (Freiburg and Tübingen, 1880). The last-named article is criticised by Bierling, "Kleine Beiträge," *ibid.*, XVI, 288–316 (1881). In this connection read also Hasse, *Das Güterrecht der Ehegattin* (Berlin, 1824), who anticipates Sohm on the nature of the Roman nuptial celebration; Cremer, *Die kirchliche Trauung* (Berlin, 1875); *idem*, "Bürgerliche Eheschliessung und kirchliche Trauung," in *Evangel. Kirchenzeitung* (1876), Nos. 32–35; Lindner, "Die Heiligung der Ehe und die Trauung," *ibid.*, Nos. 18–23; Buchka, "Die Bedeutung der kirch. Trauung," *ZKR.*, XVII (Freiburg and Tübingen, 1882); Kahl, "Civilehe und kirch. Gewissen," *ibid.*, XVIII, 295–367 (1883); Freisen, *Geschichte des canonischen Eherechts* (Tübingen, 1888).

Friedberg's *Eheschliessung*, supplemented by the *Zur Geschichte der Eheschliessung*, the *Lehrbuch des katholischen und evangelischen Kirchenrechts* (2d ed. Leipzig, 1884), and the *Geschichte der Civilehe* (Berlin, 1877), is a mine of information at every point; and his conclusions as to the validity of clandestine contracts *de praesenti* have been accepted by Pollock and Maitland in their *History of English Law* (Cambridge, 1895). Makower's *Constitutional History and Constitution of the Church of England* (London, 1895) is by far the best work on his subject, the extracts from the sources and the full bibliographical apparatus being of the greatest assistance to the investigator.

In spite of its notorious inaccuracy, Bingham's *Origines ecclesiasticae* (London, n. d.) is still of service. Conservative discussions may also be found in Göschl, *Darstellung der kirch.-christ. Ehegesetze* (Aschaffenburg, 1832); Hildebrand, *De nuptiis veterum christianorum* (Helmstadt, 1701); Moy, *Eherecht der Christen* mentioned above; and Phillips, *Lehrbuch des Kirchenrechts* (3d ed., Regensburg, 1881). Zhishman's *Das Eherecht der orientalischen Kirche* (Vienna, 1864) is the standard treatise on the subject.

In general, besides the works of Beauchet, Loening, Spirgatis, Méril, Lingard, Schmid, Thorpe, Liebermann, and others already mentioned in Bibliographical Note VI, some useful matter for the present chapter may be found in Parker, *De antiquitate britannicae ecclesiae* (London, 1729); Klein, *Das Eheverlöbniss* (Strassburg, 1881); Riedler, *Bedingte Eheschliessung* (Kempten, 1892); Freisen, *Geschichte des canonischen Eherechts* (Tübingen, 1888); *idem*, in *Archiv für katholisches Kirchenrecht*, LIII, 369 ff.]

I. THE PRIMITIVE CHRISTIAN BENEDICTION, THE BRIDE-MASS, AND THE CELEBRATION *AD OSTIUM ECCLESIAE*

IT is a noteworthy fact that the early church accepted and sanctioned the existing temporal forms of marriage. Her energy was directed mainly to the task of enforcing her own rules relating to marriage disabilities, such as those arising in affinity or nearness of kin; to devising restraints upon the freedom of divorce and second marriage; and to administering matrimonial judicature.[1] But the existing legal character and the popular forms of betrothal and nuptials were not disturbed. During the period preceding the Teutonic invasion, speaking broadly, the church adhered to the Roman law and custom; thereafter those of the Germans, even when the marriage consisted in the formal sale and tradition of the bride, were accepted.[2] The betrothal of the early canon law is, therefore, the Roman betrothal. It is a *consensus sponsalitius*, or free agreement between the man and the woman. Legally it is a *pactum de contrahendo*, or

[1] LINGARD, *Hist. of Anglo-Saxon Church*, II, 5-7; FRIEDBERG, *Eheschliessung*, 7; SOHM, *Eheschliessung*, 107, and chap. iv; SCHEURL, *Das gemeine deutsche Eherecht*, 14, 15.

[2] SOHM, *op. cit.*, 108 ff. That the church adopted the Roman marriage forms is the generally accepted view: see SEHLING, *Unterscheidung der Verlöbnisse*, 24 ff.; SCHUBERT, *Die evangel. Trauung*, 4 ff.; SCHEURL, *Entwicklung des kirch. Eheschliessungsrechts*, 8 ff.; *idem*, "Consensus facit nuptias," *ZKR.*, XXII, 269 ff.; BIENER, "Beiträge," *ibid.*, XX, 119, 120; RICHTER-DOVE-KAHL, *Lehrbuch*, 1029, 1030; LOENING, *Gesch. des deutsch. Kirchenrechts*, II, 569 ff.; DIECKHOFF, *Kirchliche Trauung*, 12 ff.; MOY, *Eherecht der Christen*, 94 ff., 215 ff., 372 ff.

On the other hand, FREISEN, in *Archiv für kath. Kirchenrecht*, LIII, 369 ff., holds that the early Christians followed mainly Jewish custom. *Cf. idem*, *Geschichte des canon. Eherechts*, 120 ff.

promise for future joining in marriage, which may be dissolved at the pleasure of either party.[1] It creates no obligation which can give rise to action for damage or fulfilment.[2] It does not constitute even the initiation of marriage. The marriage begins with the nuptials or actual wedded life, which gives expression to the *consensus nuptialis*, or mutual will of the parties to be husband and wife;[3] though, doubtless, the church demands parental consent, without making it absolutely essential.[4] On the other hand, it has been demonstrated by Sohm, contrary to the view previously accepted,

[1] *Dig.*, xxiii, tit. i, 1: "Sponsalia sunt mentio et repromissio nuptiarum futurarum." — *Corpus juris civ.*, I, 294. *Cf.* SOHM, *Eheschliessung*, 109, 110; KLEIN, *Das Eheverlöbniss*, 122 ff.

[2] By the older Roman law the betrothal was in form a contract by *stipulatio*, and there was an action for damage in case of nonfulfilment: GELLIUS, *Noctes atticae*, iv, 4; SMITH, *Dict. of Greek and Roman Antiquities*, II, 139, 140. The later law gave no such action: *Dig.*, xxiii, tit. i, 10: *Corpus juris civ.*, I, 291; *Codex*, V, 5; though to enter into two bethrothals at once was held to constitute *infamia*, the same as two marriages: *Dig.*, iii, tit. ii, 1: *Corpus juris civ.*, I, 36. *Cf.* LUDLOW, in *Dict. Christ. Antiq.*, I, 203; KLEIN, *Das Eheverlöbniss*, 22 ff., 125, 126; RIEDLER, *Bedingte Eheschliessung*, 11, 12; SCHEURL, *Entwicklung*, 9–11; LOENING, *Geschichte des deutsch. Kirchenrechts*, II, 569, 570, who shows that after the third century the betrothal became more important in Roman law; SEHLING, *Unterscheidung*, 20, 21, notes; REIN, *Das röm. Privatrecht*, 188, 189; BRISSONIUS, *De ritu nuptiarum* (Paris, 1654), 1 ff.; BEAUCHET, *Étude*, 11 ff.; SCHUBERT, *Die evangel. Trauung*, 11, notes.

[3] But SOHM, *Eheschliessung*, 110, who was preceded by GLÜCK, *Güterrecht*, 1, 97 ff., contends, against the common interpretation of the maxim *consensus facit nuptias*, that a merely "formless" *consensus* not followed by actual wedded life is not sufficient to constitute a Roman marriage. That would be practically a *consensus sponsalitius* or Roman betrothal. On the other hand, SEHLING, *Unterscheidung der Verlöbnisse*, 7 ff., 138 ff., 157 ff., insists that by the Roman law a formless nuptial contract, whether followed by cohabitation or not, constitutes a binding marriage. Such also is the view of DIECKHOFF, *Kirch. Trauung*, 15; SCHUBERT, *Die evangel. Trauung*, 4 ff., 11; and SCHEURL, *Entwicklung*, 11. But SCHEURL, "Consensus facit nuptias," *ZKR.*, XXII, 269 ff., agrees with Sohm, in effect, though not avowedly. For, while he says that marriage by *confarreatio*, for example, would be a valid marriage, even if the parties never lived together, yet the Roman law, he points out, does not reveal the evils of clandestine unions, because the formless nuptial promise implied the common wedded life. *Cf.* also BIERLING, "Kleine Beiträge," *ZKR.*, XVI, 288 ff., who criticises Scheurl; FREISEN, *Geschichte des can. Eherechts*, 101 ff.; and REIN, *Das röm. Privatrecht* (1836), 188, 189.

[4] "For even on earth children do not rightfully and lawfully wed without their father's consent."—TERTULLIAN, *To His Wife*, Book II, c. viii: *Ante-Nicene Fathers*, IV, 48. According to ULPIAN, in *Dig.*, 1, tit. xvii, l. 30, "Nuptias non concubitus, sed consensus facit." But PAULUS, *ibid.*, xxiii, tit. ii, l. 2, shows that the consensus "must be at once that of the parties themselves, and of those in whose potestas they are." See the excellent article of LUDLOW, in *Dict. Christ. Antiq.*, I, 433–36.

that the two betrothals of the mediæval canon law are based on the German betrothal.[1] If not the marriage itself, it is nevertheless, as already seen, an act for joining in marriage which is not easily dissolved.

The only innovation effected by the primitive church was of a purely religious character. Though she might content herself with the Roman or the Germanic forms of marriage, there remained an "ethical mission" peculiarly her own. "In order at the very outset to fill the wedded life with the blessing and spirit of the Christian life, the church, without reference to the matrimonial law in force, demanded of her members that the very beginning of marriage should be placed under the word of God and be hallowed by its power."[2] Hence, from the first century onward, we find evidence of a priestly benediction usually in connection with the betrothal and probably with the nuptials.[3] Thus Ignatius declares that it "becomes both men and women who marry, to form their union with the approval of the bishop,"

[1] SOHM, *Eheschliessung*, 107–52; *idem*, *Trauung und Verlobung*, 58–109. In opposition to Sohm's view, SEHLING, *Unterscheidung der Verlöbnisse*, 138 ff., 165 ff., contends that the *sponsalia* (betrothal and nuptial promises) of the mediæval canon law are derived from the law of Rome. Such also is the position of ZOEPFL, *Deutsche Rechtsgeschichte* (4th ed.), III, §§ 81 ff.; SCHULTE, *Handbuch des kath. Eherechts* (1855), 37, 278; WALTER, *Kirchenrecht* (14th ed.), § 298; and LOENING, *Gesch. des deutsch. Kirchenrechts*, II, 601, following Sohm in the main. SCHUBERT, *Die evangel. Trauung*, 37, takes a medial position: "die Kirche bildete ihr eigenes Recht in Anlehnung an das deutsche Recht aus." SCHEURL, *Entwicklung*, 93, 94, 95 ff., *passim*; *idem*, *Das gemeine deutsche Eherecht*, 14, 15, reviews and criticises Sohm on various points. FRIEDBERG, *Verlobung und Trauung*, 25, contrary to the position taken in *Eheschliessung*, 6, 202, accepts Sohm's view, but with reservations. See also his *Lehrbuch*, 339 ff.

[2] SOHM, *Eheschliessung*, 107, 108. *Cf. idem*, *Ob. Civilehe*, 25; and SCHUBERT, *Die evangel. Trauung*, 5 ff., who agrees with Sohm. The conservative view of the religious character of early Christian marriage is represented by KLEIN, *Eheverlöbniss*, 95 ff.; DIECKHOFF, *Die kirch. Trauung*, 20 ff., *passim*.

[3] The custom of benediction may have been influenced by Jewish practice. The Hebrew benediction was given "not necessarily by a priest, but by the eldest friend or relative present": MEYRICK, in *Dict. Christ. Antiq.*, II, 1107, who gives the benediction in abridged form. *Cf.* SELDEN, *Uxor ebraica*, II, 12.

On the teachings of the Christian fathers as to the form of marriage see MARTENE, *De ritibus*, II, lib. I, c. ix, 120–44; SELDEN, *Uxor ebraica*, 179–84, 665–69, *passim*; SCHUBERT, *Die evangel. Trauung*, 4 ff.; LOENING, *Gesch. des deutsch Kirchenrechts*, II, 573 ff.; DIECKHOFF, *Die kirch. Trauung*, 20 ff.; FRIEDBERG, *Lehrbuch*, 337 ff.; PHILLIPS, *Lehrbuch*, 612 ff.; BIENER, "Beiträge," *ZKR.*, XX, 119–27.

that it may be according to God.[1] Tertullian speaks of marriage being "requested" of bishops, presbyters, or deacons;[2] and he shows in another place that publicity was an important motive for encouraging unions "in presence of the church."[3] In a somewhat obscure passage of the treatise addressed to his wife, which is much relied upon by sacerdotal writers, he exclaims: "How should we be sufficient to set forth the bliss of that marriage which the church brings about, and the oblation confirms, and the benediction seals, angels proclaim, the Father ratifies?"[4] But here a legal importance is given to the benediction which it does not seem to have gained until centuries later.[5] A similar doubt attaches to the words of Ambrose, who, writing against mixed marriages, says: "For since marriage itself should be sanctified by the priestly veil and by benediction, how can that be called a marriage where there is no agreement of faith?"[6] But, "as Selden has observed, the like benedictions were often claimed in behalf of many other kinds of contract besides that of marriage—a sale, for instance."[7] In the eastern church likewise the letters of Gregory Nazienzen and the silence of Chrysostom show that the benediction was without legal significance.[8] By the Roman law no betrothal or nuptial ceremonial is prescribed. The solemnities were determined by local custom; and these the early Christians were willing to accept. For centuries a marriage liturgy was not adopted either in the East or in

[1] IGNATIUS, *Epistle to Polycarp*, IV: *Ante-Nicene Fathers*, I, 95.

[2] TERTULLIAN, *On Monogamy*, xi: *Ante-Nicene Fathers*, IV, 67.

[3] TERTULLIAN, *On Modesty*, v: *Ante-Nicene Fathers*, IV, 77. *Cf.* MEYRICK, art. "Marriage," in *Dict. Christ. Antiq.*, II, 1106, who thinks, aside from the religious motive, members might thus avoid the violation of laws of the state with which they were unacquainted.

[4] LUDLOW, on "Benediction," in *Dict. Christ. Antiq.*, I, 193; *cf.* the reading in *Ante-Nicene Fathers*, IV, 48.

[5] LUDLOW, *loc. cit.*

[6] AMBROSE, Book IX, ep. 70; LUDLOW, *loc. cit.*

[7] LUDLOW, *ibid.*; SELDEN, *Uxor ebraica*, Lib. II, cc. xxiv, xxv.

[8] LUDLOW, *op. cit.*, I, 194.

the West.[1] According to Tertullian, no "breath of idolatry" attaches even to the heathen ceremonies connected with espousals,[2] among which he mentions the ring, the kiss, the veil, and the joining of hands.[3] The ring came more and more under German influence to be used as an *arrha*.[4] Witnesses were required; and in connection with the nuptials we hear also of the "pomp" or procession to the bridegroom's home, and the "crowning" of the bride or the wedded pair, usually with flowers.[5]

It seems probable, then, that during the first three or four centuries Christian marriages were not as a rule celebrated in church.[6] The betrothal or nuptial benediction

[1] In both East and West, between the sixth and seventh centuries: LUDLOW, *ibid.*

[2] TERTULLIAN, *On Idolatry*, XVI: *Ante-Nicene Fathers*, III, 71. *Cf.* LUDLOW, on "Betrothal," *op. cit.*, I, 203.

[3] TERTULLIAN, *loc. cit.*; *idem*, *On the Veiling of Virgins*, XI: *Ante-Nicene Fathers*, III, 71; IV, 34. On the ring see *Dict. Christ. Antiq.*, I, 248, 249, 202; II, 1105, 1807, 1808; for the kiss see *ibid.*, II, 905, 906. By the Theodosian Code, lib. v, tit. 3, leg. 16, one-half of the bridegroom's gifts, after his death, were delivered to his betrothed in case the betrothal were sealed by a kiss; otherwise all was given to his relatives: *ibid.*, II, 1110. In England, and elsewhere, the kiss was a characteristic of public spousals; and when these were recognized by the church the kiss was sanctified by the priest: JEAFFRESON, *Brides and Bridals*, I, 65-67; BRAND, *Pop. Antiq.*, II, 139-41. *Cf.* also MÉRIL, *Des formes et des usages*, 37, 38; SPIRGATIS, *Verlobung und Vermählung*, 16, 17. The veil was originally used at the betrothal, from the time of which ceremony onward in early days it was worn habitually by the betrothed as well as by the married woman: MEYRICK, in *Dict. Christ. Antiq.*, II, 1108, 1109.

[4] LUDLOW, on "Arrhae," in *Dict. Christ. Antiq.*, I, 142-44: MEYRICK, *ibid.*, II, 1105.

[5] For the crowning in the eastern church see ZHISHMAN, *Das Eherecht der orient. Kirche*, 135, 156, 692 ff.; *cf.* MARTENE, *De ritibus*, I, 125. The crown was made of flowers, often of olive or myrtle, and sometimes of silver or gold. The custom appears in the West, but it became at length so important in the East that the "whole marriage was called the crowning, as in the West it was called the veiling": MEYRICK, in *Dict. Christ. Antiq.*, II, 1108, 1109; *cf. ibid.*, I, 511. The pomp is, of course, the Greek *pompa:* FUSTEL DE COULANGES, *Ancient City* (Boston, 1896), 55 ff., corresponding to the Roman *traductio* and the German *Brautlauf.*

[6] Pope Nicholas (A. D. 860), in his replies to the Bulgarians, who had asked his counsel concerning marriage rites, says concerning the nuptials: "First of all they are placed in the church with oblations, which they have to make to God by the hands of the priest, and so at last they receive the benediction and the heavenly veil." On this letter see SELDEN, *Uxor ebraica*, Lib. II, c. XXV, 179; MARTENE, *De ritibus*, I, 124, 125; DIECKHOFF, *Die kirch. Trauung*, 47 ff.; BEAUCHET, *Étude*, 34. From this letter and the statements of the Fathers concerning the benediction, already mentioned, MEYRICK, in *Dict. Christ. Antiq.*, II, 1106, 1107, concludes, "There is no reasonable doubt that the place in which Christians were ordinarily married was a church, so soon as it became safe and customary for them to meet in churches for

was not essential to a valid marriage, however important it may have been regarded from a religious point of view.[1] Gradually it became an established custom for the newly wedded pair, after solemnization of the nuptials, to attend religious services in the church and partake of the sacrament, at the close of which the priest invoked a blessing upon the future married life. But at first the church service was the ordinary service; only after a considerable interval were phrases introduced into the prayers especially applicable to the wedded pair.[2]

Thus stood the custom in the period immediately following the conversion of the Teutonic nations. The nuptials consisted of two distinct acts. The first was the *gifta*, or traditional ceremony in the usual form. Thereafter, often on the day following the bridal night,[3] the newly wedded couple celebrated the bride-mass (*Brautmesse*) and received the benediction of the priest. But this religious act had

religious purposes, and that the way in which they were ordinarily married was by a religious ceremony," though especially in the East (CHRYSOSTOM, *Hom. xlviii, in Gen.*, c. 24) the religious ceremony often took place in houses. But so far as western Christendom is concerned, the sources show that marriage in church was of slow growth. JEAFFRESON, *Brides and Bridals*, I, 48, 49, doubts whether the Anglo-Saxons always celebrated marriage in their homes.

[1] SOHM, *Eheschliessung*, 153 ff., insists that the priestly benediction, unless here and there by local custom, was connected with the nuptials (*Trauung*) and not with the betrothal, which he regards as the essential element in marriage. But DIECKHOFF, *Die kirch. Trauung*, 20 ff., 30 ff., 47 ff., 65 ff., claims that from the earliest period among the Christians it was customary for the priest to bless the betrothal; and that at least from the fourth century the same is true of the nuptials. In his *Zur Trauungsfrage*, 17, note, SOHM seems to accept Dieckhoff's view, while denying anything but religious meaning to the benediction in either case.

SIRICIUS, *Epist. ad Himer.*, § 4, mentions a "benediction of the priest at betrothal, of so solemn a nature as to make it sacrilege in the betrothed woman to marry another man;" but this epistle may be spurious: MEYRICK, in *Dict. Christ. Antiq.*, II, 1106. *Cf.* SCHEUERL, *Entwicklung*, 24, 25; SEHLING, *Unterscheidung*, 25, notes, 110; LOENING, *op. cit.*, II, 573; and, for the eastern church, ZHISHMAN, *Das Eherecht der orient. Kirche*, 126, 135, 156, 672, 289 ff., *passim*.

[2] SOHM, *Eheschliessung*, 157. This stage of the bride-mass is disclosed by the oldest *sacramentaria*, of about the fifth century; and the same ritual was in use in the Frankish church in the ninth century.

[3] FRIEDBERG, *Eheschliessung*, 78–93, where numerous proofs from the mediæval poets and other sources are given; but sometimes marriage in church appears. *Cf.* SOHM, *op. cit.*, 159 n. 16.

no legal significance. No doubt it was performed by all good Christians as a religious duty. The benediction was invoked on the married life, a fact of such immense ethical importance, just as it was invoked on all important undertakings. It was observed as a fitting solemnity for a believer and not as a part of the marriage. Therefore in the case of second marriages it was omitted.[1] Broadly stated, the canon law maintained the validity of all proper marriages solemnized without the priestly benediction, though spiritual punishment might be imposed for neglect of religious duty. Such is the view of Sohm, and it has been generally accepted.[2] Dieckhoff,[3] however, contests it at every point. He holds that from early days the priestly benediction, whether of betrothal or of nuptials, was an essential part of the Christian marriage celebration. In support of the theory, that originally the church really undertook to join persons in wedlock, he presents three services from Roman *sacra-*

[1] In all the early rituals the benediction is not allowed in case of a second marriage, at any rate unless the first marriage of one or both of the parties had not been blessed by the priest; and long paragraphs of the service are devoted to explaining the alleged reasons for this, and to the still harder task of showing how a second marriage can be a sacrament and yet less holy than a first marriage. This dilemma led to curious compromises, as in the service used at the marriage of King Ethelwulf with Judith, his father's widow, in the year 856; see the service in PERTZ, *Monumenta, leg.*, I, 420; and DIECKHOFF, *Die kirch. Trauung*, 73, 74. On this topic compare the York, Sarum, and Hereford rituals in Surtees Society *Publications*, LXIII, 35–37, Appendix, 23, 24, 117, 118; and the Sarum (Salisbury) ritual in MASKELL, *Monumenta ritualia*, I, 71–74; also *Rituale romanum Pauli Quinti*, 198; MARTENE, *De ritibus*, II, 121, 122; *Excerp. Ecgberti*, 91: in Thorpe, II, 110; AELFRIC'S *Canons*, 9: *ibid.*, II, 347; FRIEDBERG, *Eheschliessung*, 36; SCHMID, *Gesetze*, 562; BOHN, *Pol. Cyc.*, III, 319. SELDEN, *Uxor ebraica*, II, c. 30, maintains that the practice of celebrating nuptials before a priest was not general among primitive Christians. This is declared an error by BINGHAM, *Origines*, VII, 328 ff., who, like Dieckhoff and most ecclesiastical writers, holds that the custom was general and obligatory.

[2] SOHM, *Eheschliessung*, 107 ff., 153 ff.; *idem*, *Zur Trauungsfrage*, 10 ff.; *idem*, *Obligat. Civilehe*, 25 ff. In substantial agreement with Sohm are LOENING, *Gesch. des deutsch. Kirchenrechts*, II, 569–606: FRIEDBERG, "Zur Geschichte," *ZKR.*, I, 374 ff.; BIENER, "Beiträge," *ibid.*, XX, 119–47; SCHEURL, *Entwicklung*, 110 ff. *Cf.* BEAUCHET, *Étude*, 30 ff.; SPIRGATIS, *Verlobung und Trauung*, 4 ff.; SCHUBERT, *Die evangel. Trauung*, 14 ff.; KLIEFOTH, *Liturgische Abhandlungen* (2d ed.,1869), I, 136 ff.

[3] DIECKHOFF, *Die kirch. Trauung*, 29 ff., 45, 46 ff., 65 ff.; *idem*, *Civilehe und kirch. Trauung*, 14 ff. Much earlier, MOY, *Eherecht der Christen*, 216, 217, had taken the same view.

mentaria of the age of Charles the Great.[1] But it is by no means certain that the words of the text relied upon for proof are not of too recent origin to be convincing as to early usage; and if they really belong to the time assigned, they cannot, in face of other evidence, be accepted as showing the general custom of the West, but rather, like the often-cited Capitulary,[2] of 802, as merely revealing the aim and desire of the church.

The introduction of the bride-mass constitutes the second stage in the history of clerical marriage. In English history it is represented by several spousal services which have been published by the Surtees Society.[3] They cover the period from the eighth to the eleventh century, beginning with the Pontifical of Egbert, archbishop of York (732–66) and ending with the *Rede Boke* of Darbye (*ca.* 1050), now in the library of Corpus Christi College, Cambridge. These services consist wholly of prayers and benedictions. There is no mention of the mass, though doubtless the husband and wife have already partaken of the communion before the service. Apparently the function of the priest is purely religious. It is merely an invocation of the divine blessing upon the life of the newly wedded pair, and has no legal significance. The nuptials have already been solemnized, whether in the presence of the priest or not the formularies do not explain.

[1] DIECKHOFF, *Die kirch. Trauung*, 35 ff.: *sacramentaria* of Popes Leo, Gelasius, and Gregory I. These, he thinks, show not merely a "divine benediction of the marriage already concluded, but essentially a divine joining in marriage." These services are also contained in DANIEL, *Codex liturgicus*, I, 257 ff.; and that of Gelasius in MARTENE, *De ritibus*, II, 127.

[2] Charles the Great in the Capitulary of 802, c. 35, WALTER, *Corpus juris germ.*, II, 167, prescribes the benediction of the nuptials by a priest; but this is thought to have had little effect. The benediction is also required by several false capitularies: FRIEDBERG, *Eheschliessung*, 58, 59. On this decree of 802 see also SCHUBERT, *Die evangel. Trauung*, 19; BEAUCHET, *Étude*, 30, 31.

[3] Surtees Society *Publications*, LXIII, Appendix, 157 ff. In the *Ordo* of Archbishop Egbert, for instance, a blessing is invoked upon the parties, the bridal chamber, and the marriage bed; and the other *Ordines* there printed are of the same general character.

But already in the tenth century we reach the beginning of a third stage in the rise of the ecclesiastical ceremony.[1] The nuptials still consist of two distinct acts. The first is the *gifta* proper, according to the usual temporal forms. It is no longer a strictly private transaction,[2] but it takes place before the church door—*ante ostium ecclesiae*[3]—in the presence of the priest, who participates in the ceremony and closes it with his blessing. The second act consists in the entrance into the church and the celebration of the bride-mass, followed by a second benediction. But the *gifta*, even in this stage, is temporal and not ecclesiastical. It occurs "before and not within the church," the motive usually assigned being to induce an immediate attendance upon communion on the very day of the nuptials instead of after an interval. In reality, however, the custom is but a recognition of the temporal nature of wedlock, which ought therefore to be celebrated before and not within the consecrated building.[4] That such was the prevailing custom throughout the western church during the Middle Ages is established by a mass of evidence of the most convincing character. Besides the testimony of chroniclers, historians, and literary men, we have that of the law-books and legal writers, lay and ecclesiastical, which make frequent mention of the assignment of the wife's dower at the church door during the nuptial cele-

[1] It need not surprise us that these phases of evolution chronologically overlap each other; for social development is seldom uniform.

[2] *Haustrauung:* SOHM, *Eheschliessung*, 158.

[3] Also *ad valvas ecclesiae*, *in facie ecclesiae*, *in conspectu ecclesiae*, *ad fores ecclesiae*, etc.

[4] "By performing the civil rite outside the walls of the church they declared the fundamental nature of the matrimonial contract, and asserted the doctrine of the common law of the land respecting its meaning and purpose."—JEAFFRESON, *Brides and Bridals*, I, 53. This view is of course rejected by DIECKHOFF, *Die kirch. Trauung*, 76, note, 79 ff., who regards the ecclesiastical transaction as a real ecclesiastical celebration necessary to the marriage in the eyes of the church. *Cf.* BIERLING, "Kleine Beiträge," *ZKR.*, XVI, 288 ff., who criticises DIECKHOFF (*Civilehe und kirch. Trauung*), and agrees with SOHM (*Zur Trauungsfrage*, 10) that the ecclesiastical transaction must not be confused with ecclesiastical marriage.

bration.[1] Moreover, many of the ancient rituals themselves have been preserved. All these "are unanimous," says Léon Gautier, following Martene, "in placing the principal act of the marriage celebration, that is to say the consent of the parties, at the entrance or in the porch of the church;"[2]

[1] GLANVILLE, *Tractatus*, lib. vi, c. 1: PHILLIPS, II, 381. "The term dower is used in two senses. Dower in the sense in which it is commonly used means that which any free man at the time of his being affianced (tempore desponsationis) gives to his bride at the church door": GLANVILLE, vi, c. 1, as translated by JOHN BEAMES (London, 1812). *Cf.* also SELDEN, *Fleta*, lib. v, c. 23, pp. 340, 341; BRACTON, *De legibus*, lib. ii, c. 39 (fol. 92), Vol. II, 48; HORNE, *The Mirror of Justices* (ed. WHITTAKER, London, 1895), 11; FITZHERBERT, *New Natura Brevium* (Dublin, 1793), 352 (150); HENGHAM, *Summa parva*, c. ii: "Brevia de dote ad ostium ecclesiae;" SELDEN, *Uxor ebraica*, 198, or in *Opera*, III, 680.

That the *gifta*, or celebration as a temporal act, should take place before the church door is thoroughly in harmony with the early view that there purification or preparation should be made for the rites or service within the sanctuary. The *atrium* sometimes seems to be regarded as the medial ground between the world on the one hand and the sacred temple of God on the other; see, for example, *Old Eng. Homilies*, I, 72, 73: children are to be baptized in holy church, "and their godfathers and godmothers are to answer for them at the church-door, and enter into pledges (covenants) at the font-stone, that they should be believing (faithful) men." This passage is referred to in MÄTZNER, *Altenglisch. Sprachproben* (Berlin, 1878), II, 578, at "chirchedure." GREGORY, in his *Pastoral Care*, 104, 105, referring to the brazen basins before the Temple supported by twelve oxen, says the bishops when they "descend to wash the sins of their neighbors, when they confess, they support, as it were, the basin before the church-door." According to the *Capitula et fragmenta Theodori*, THORPE, *Ancient Laws* (folio), 313, "Si in atrio ecclesiae quislibet injuriaverit aliquem presbyterum, vel ibidem aliquod sacrilegium perpetraverit, altari et Domino componatur." With this compare ÆTHELRED, *Laws*, VII, 13: THORPE, *Ancient Laws* (folio), 142; GRIMM, *Wörterbuch*, *s. v.* "Kirchthor;" MURRAY, *New Eng. Dict.*, Part V, 406, at "church-door;" *Ormulum*, I, 43, ll. 1326, 1327; CHAUCER, *Prolog.*, 460: "Housbondes at chirche dore she hadde fyve." See also WARNKÖNIG AND STEIN, *Französische Verfassungsgeschichte*, II, 257; WEINHOLD, *Deutsche Frauen*, I, 377, 378; WHITGIFT, *Works*, II, 461–64; BRAND, *Pop. Ant.*, II, 133–35; JEAFFRESON, *Brides and Bridals*, I, 46–59; SPIRGATIS, *Verlobung und Trauung*, 20, 21; SCHUBERT, *Die evangel. Trauung*, 20.

[2] LÉON GAUTIER, *La chevalerie*, 424 n. 3: *ap.* MARTENE, *De ritibus*, who says: "Nuptiae communiter solent celebrari *ad valvas ecclesiae;*" and places before us abundant proof in the sixteen *ordines* which he publishes, *ibid.*, II, 127–44. Gautier cites also ÉTIENNE DE BOURBON, ed. of LECOY DE LA MARCHE, 366: "Cum duceretur . . . . ad parrochiam . . . . *et esset sub porticu ecclesiae ut sponsa sua ei consentiret* et matrimonium ratificaretur per verba de praesenti, ut moris est, et sic in ecclesia matrimonium solempnizaretur in misse celebratione et aliis." The same writer makes a thorough examination of the "Pontifical ou rituel de lire" (published by MARTENE, II, coll. 356–59, who assigns it to the twelfth century), comparing it with other rituals, with illustrations and proofs from many sources. In chaps. ix to xi inclusive, entitled "Le mariage du chevalier" (*op. cit.*, 341–450), Gautier gives a learned and most interesting discussion of mediæval marriage rites and customs. Compare DANIEL, *Codex liturgicus;* and the summaries in PALMER, *Origines liturgicae*, I, 106 ff.

and what is thus affirmed for the rituals of France is equally true for those of Germany[1] and England. "In the first place," runs the opening rubric of the Sarum *Ordo ad faciendum sponsalia*, "let the man and the woman stand before the church door in the presence of God, the priest, and the people, the man on the right of the woman, and the woman on the left of the man." Here the bride and groom remain during the nuptial celebration, the assignment of the dower, and the closing benediction. Thereupon, as the rubric directs, "let them enter the church as far as the steps of the altar," where, after a psalm, they are to prostrate themselves while a prayer is said in their behalf.[2] The usage of Sarum in this regard is typical, differing only in words and arrangement from that of York, Hereford, or the other churches. Indeed, marriage continues to be celebrated at the church door until the sixteenth century, the liturgies of Edward VI. and Elizabeth first requiring as a general observance the ceremony to be performed in the body of the church.[3]

[1] See SOHM, *Eheschliessung*, 153–63; and FRIEDBERG, *Eheschliessung*, 37, 38, who reach this conclusion from an examination of the various English and continental rituals; especially the ritual of Rennes, *ca.* eleventh century, in MARTENE, II, 127; also SOHM, *op. cit.*, 159, 160; DIECKHOFF, *Die kirch. Trauung*, 77, 78.

[2] "Manual ad usum Sarum," in Surtees Society *Publications*, LXIII, Appendix, 17–20; also in MASKELL, *Monumenta ritualia*, I, 50–77. Compare the rituals of York, Hereford, and the others contained in Surtees Society *Publications*, LXIII, 24 ff., 115 ff., 160 ff.; also the "Rituel de lire" in LÉON GAUTIER, *La chevalerie*, 424–31, as summarized in capitals in the margin; and the ritual of Rennes in MARTENE, *De ritibus*, II, 127; or in SOHM, *Eheschliessung*, 159, 160: "In primis veniat sacerdos ante ostium ecclesiae indutus alba atque stola cum benedicta aqua; qua aspersa, interroget eos sapienter, utrum legaliter copulari velint, et quaerat quomodo parentes non sint, et doceat quomodo simul in lege Domini vivere debeant. Deinde *faciat parentes secuti mos est dare eam*, atque sponsum dotalitium dividere, cunctisque audientibus legere, ipsumque suae sponsae libenter dare. . . . . Qua finita, *intrando in ecclesiam, missam incipiat*," etc.

[3] *Liturgy of Edward VI.* (Parker Society), 127; *Liturgy of Elizabeth* (Parker Society), 217. Compare WHITGIFT, *Defence of the Answer*, II, 462, where he defends the requirement of the "book," that "persons to be married shall come into the body of the church, with their friends and neighbours, there to be married," against THOMAS CARTWRIGHT in his *Reply to the Answer*, 105, sec. 2, who ridicules the prescribed ceremonial. "Likewise for marriage," says Cartwright, "he (the priest) cometh back again into the body of the church, and for baptism unto the church-door: what comeliness, what decency, what edifying in this? Decency (I say) in running and trudging from place to place: edifying in standing in that place, and after that sort, where he can worst be heard and understanded."

One of the very earliest references to the presence of the priest at the nuptials is contained in the last two sections of the old English ritual of the tenth century already quoted in part,[1] and this ritual may be regarded as marking the transition to the period under consideration.

"8. At the nuptials there shall be a mass-priest by law; who shall with God's blessing bind their union to all prosperity.

"9. Well is it also to be looked to, that it be known, that they, through kinship, be not too nearly allied; lest that be afterwards divided, which before was wrongly joined." [2]

It is evident, as Friedberg has remarked, that the office of mass-priest in this ritual is of no legal significance. The invocation of a divine blessing is merely a religious act after the marriage is complete.[3] It is no more a part of the *gifta* than is the caution, in the last section, against marriage within the degrees of relationship forbidden by the canons. It is plain that in this formulary the betrothal and not the nuptials absorbs well-nigh the whole attention of the lawgiver. It is manifestly the thing of deepest concern; and in this the priest has no part.[4]

According to Lingard, "there is no trace of any form of marriage contract in ancient English sacramentaries previously to the close of the twelfth century; and the earliest mention of it appears in the constitutions of two English prelates, Richard Poere, bishop of Sarum, and Richard de Marisco, bishop of Durham, who ordered the parish priests to teach the bridegroom this form, 'I take thee N. for my

[1] This is next to the oldest mention, after the Germanic conquest, of the priestly benediction; the first is the marriage of Judith to the Saxon king Æthelwulf, 856, elsewhere mentioned.

[2] SCHMID, Anhang VI, 392, 393: THORPE, I, 255, 257.

[3] FRIEDBERG, *Eheschliessung*, 35; compare LINGARD, *History and Antiquities of the Anglo-Saxon Church*, II, 7–11, who gives the form of benediction.

[4] SOHM, *Eheschliessung*, 100 n. 60. This view is of course opposed by DIECKHOFF, *Die kirch. Trauung*, 69 ff.

wife,' and the bride a similar form, 'I take thee N. for my husband.'"[1] This statement, however, may now require some modification. Judging from its brevity and its condensed, almost crude, diction, the ritual published by the Surtees Society from a pontifical in the library of Magdalen College, Oxford, may have originated at an earlier date in the twelfth century;[2] and this seems all the more probable, for French rituals, in which the priest takes a leading part in directing the spousal contract, are preserved from a still earlier period.[3] However this may be, the rituals of Sarum, York, and Hereford are among the most ancient, the most elaborate, and the most instructive which have anywhere been preserved, those of Sarum and York having been in force from about the end of the twelfth century until 1549. They contain a rich store of material for the student of the marriage contract, carrying him back to the cradle of the English race in the Saxon forests. Beneath the ecclesiastical covering, the adventitious mass of prayers, psalms, and benedictions, is a kernel of primitive Teutonic custom which he will at once recognize.

The York service may be taken as a type, for it does not differ in any important particular from the other two. In it the advance of the clergy is very marked. The priest directs or participates in the whole procedure. The ceremony takes place before the church door, as the rubric directs, the man standing "on the right of the woman and the woman on the left of the man."[4] Then the priest is

[1] LINGARD, *op. cit.*, II, 10, note; *ap.* WILKINS, *Conc.*, I, 582.

[2] Surtees Society *Publications*, LXIII, Appendix, 160, 161. See also the "Benedictio annuli, sponsi et sponsae" from the Ely Pontifical, Cambridge University library, of the twelfth century, *ibid.*, 161, 162, in which the priest leads in blessing the ring, assigning the dower, and directing the "giving" of the woman. It is probably a part of a very early ritual.

[3] See the rituals of Rennes, *ca.* eleventh century, and *de lire*, twelfth century, already referred to.

[4] "Statuantur vir et mulier ante ostium ecclesiae coram Deo et sacerdote et populo, vir a dextris mulieris et mulier a sinistris viri": York manual, in Surtees

to ask the banns in the mother-tongue, following the Latin formula prescribed in the ritual, first addressing the people:

"Lo, bretheren, we are comen here before God and his angels and all his halowes, in the face and presence of our moder holy Chyrche, for to couple and to knyt these two bodyes togyder, that is to saye, of this man and of this woman, that they be from this tyme forthe, but one body and two soules in the fayth and lawe of God and holy Chyrche, for to deserue everlastynge lyfe what someuer that they have done here before."

"I charge you on Goddes behalfe and holy Chirche, that if there be any of you that can say any thynge why these two may not lawfully be wedded togyder at this tyme, say it nowe outher pryuely or appertly, in helpynge of your soules and theirs bothe."

Secondly, addressing the man and the woman:

"Also I charge you both and eyther be your selfe, as ye wyll answer before God at the day of dome, that yf there be thynge done pryuely or openly, betwene yourselfe, or that ye knowe any lawfull lettyng why that ye may nat be wedded togyder at thys tyme, say it nowe or we do any more to this mater."[1]

If no objection to the marriage is made, the priest, in several long paragraphs of the service, explains the canons relating to publication of banns, the times when the ecclesiastical celebration is forbidden, and the evils growing out of clandestine unions, with the penalty of three years' sus-

Society *Publications*, LXIII, 24. *Cf.* the Sarum, Hereford, and Welsh rituals, *ibid.*, Appendix, 17, 115, 167; also the Sarum ritual in MASKELL, I, 50. All these place the man on the right of the woman; but in "one MS. Manual of Sarum Use (early XVth century)," the woman "stands on the *right* hand of the man": HENDERSON, in preface to Surtees Society *Publications*, LXIII, xviii, xix.

[1] Compare the similar provisions, in more archaic words, in the Salisbury manual in the British Museum: MASKELL, *Monumenta ritualia*, I, 52-54, margin; and the Latin form there given in the text.

pension from office for the priest who fails to prohibit such marriages in his parish. Then follows the essential act, the celebration of the *sponsalia*. This, as already mentioned, is in two distinct parts. The first part is the repetition of the betrothal *per verba de futuro*, the priest putting the vows in the form of a question to each party. He says to the man:

"*N.*, wylt thou haue this woman to thy wyfe and loue her [and wirschipe hir[1]] and keep her, in sykenes and in helthe, and in all other degrese be to her as a husbande sholde be to his wyfe, and all other forsake for her, and holde the only to her to thy lyues ende."

The man is to answer: "I wyll." The priest then says to the woman:

"*N.*, wylt thou haue this man to thy husbande, and to be buxum to hym [luf hym, obeye to him, and wirschipe[2] hym], serue hym and kepe hym in sykenes and in helthe: and in all other degrese be unto him as a wyfe shulde be to her husbande, and all other to forsake for hym, and holde the only to hym to thy lyues ende."

The woman is to say: "I wyll."

This closes the first part. The second part is the *gifta*, or marriage properly so called, *per verba de praesenti*. The priest says: "Who gyues me this wyfe?" "Then," runs the Latin rubric, "shall the woman be given away by her father or by a friend; if a maid, she shall have her hand bare; if a widow, she shall have it covered.[3] The man shall receive her to keep in God's faith and his own, as he has vowed before the priest; and holding her by the right hand with

[1] The words in the brackets in the formulæ for both parties are added in the Cambridge MS. of the York ritual.

[2] It will be noted that in the Cambridge MS. both the man and the woman promise to "worship." The same is true of the manuscript Salisbury ritual in the British Museum: MASKELL, *op. cit.*, I, 53.

[3] This provision is found in all these early rituals. *Cf.* LÉON GAUTIER, *La chevalerie*, 427, note.

his right hand, he shall plight the woman his troth in words of the present tense, saying after the priest:

"Here I take thee *N.* to my wedded wyfe, to haue and to holde, at bedde and at borde, for fayrer for fouler, for better for warse, in sekeness and in hele, tyl dethe us departe, and thereto I plyght the my trouthe;" and the woman makes the same vow in the same words.

"Then shall the man place gold, silver, and a ring upon a shield or a book. And the priest shall enquire whether the ring has already been blessed." If not, the priest is to bless it in prescribed form, and sprinkle it with holy water. Then follows a curious ceremony. The bridegroom "takes the ring with his three principal fingers, and says after the priest, beginning with the thumb of the bride, '*In nomine Patris;*' at the second finger, '*et Filii;*' at the third finger, '*et Spiritus Sancti;*' at the fourth or middle finger, '*Amen;*'[1] and there he leaves the ring, because according to the Decree . . . . 'in the middle finger there is a certain vein extending to the heart.'"[2]

After this delicious bit of popular superstition, handed down to our own days from remote antiquity, the bridegroom, holding his bride by the hand, says after the priest: "With this rynge I wedde the, and with this golde and siluer I honoure the, and with this gyft I dowe thee."

The priest next "asks the dower of the woman." If "land is given her in the dower," the bride "prostrates herself at the feet of the bridegroom;" but the York ritual does not go

[1] This formula is common to the early rituals. It is omitted in the modern service of the English church, but retained in the present Roman ritual: BINGHAM *The Christian Marriage Ceremony*, 180.

[2] "Et ibi dimittat annulum secundum decretum xxx. quaestione v. Feminae, ad finem: quia in medico est quaedam vena procedens usque ad cor": p. 27. *Cf.* GRATIAN'S *Decretum*, in RICHTER-FRIEDBERG, *Corpus jur. can.*, I. The "vein extending to the heart" is likewise mentioned in the rituals of Hereford and Sarum, and in the Welsh ritual of the fifteenth century. The Sarum ritual adds: "et in sonoritate argenti designatur interna dilectio, quae semper inter eos debet esse recens": Surtees Society *Publications*, LXIII, Appendix, 20.

so far as one manuscript of the Sarum manual, in requiring that the woman shall "kiss the right foot" of her spouse.[1]

The ceremony ends with prayer and benediction, followed by the entrance into the church for celebration of the bridal mass.[2]

The historical significance of the ritual just analyzed is readily perceived.[3] In the ring, the gold, and the silver there is a plain recognition of the *arrha*, though it was coming to be regarded as a kind of symbolical assignment of the wife's dower.[4] It is noticeable that the tradition is still conducted by the "father or a friend." It is a private lay transaction in which the priest has no legal part. He is still a mere orator, rather than a necessary actor, though there is a manifest effort to gain the recognition of the priestly office as essential to a Christian marriage. Martene has pointed out that in all the early rituals the words *vos con-*

[1] Thus a "MS. Manual of Sarum Use" provides, "whether there is land in the doury or not": "Tunc procidat sponsa ante pedes ejus, et deosculetur pedem ejus dextrum; tunc erigat eam sponsus": Surtees Society *Publications*, LXIII, 20, note; and HENDERSON, *ibid.*, xix. On the York and Sarum rituals see SELDEN, *Uxor ebraica*, 193 ff.; and the points discussed are all illustrated in the *Ordines* published in MARTENE.

[2] This ritual also provides a form for the priestly blessing of the bridal chamber (*benedictio thalami*) and the nuptial couch: "Nocte vero sequenti cum sponsus et sponsa ad lectum pervenerint, accedat Sacerdos et benedicat thalamum;" the blessing concluding with the direction: "Tunc secundum morem antiquum thurificentur torus et thalamus": 39, 40. Similar forms are given in the Hereford, Sarum, and Bangor rituals: Surtees Society *Publications*, LXIII, Appendix, 25, 26, 120; MASKELL, I, 76, 77 n. 47.

[3] For a good summary of the Sarum and other rituals see FRIEDBERG, *Eheschliessung*, 36 ff.; and see the ceremonies of 1502 and 1554, in the "Gentlemen's Magazine Library," *Manners and Customs*, 57.

[4] Thus a manuscript manual of Salisbury use has this "curious addition;" the priest says: "Loo this gold and this siluer is leyd doun in signifyinge that the woman schal haue hure dower, thi goodes, zif heo abide aftur thy disces": fol. 17; *ap.* MASKELL, *Monumenta ritualia*, I, 58 n. 14. LÉON GAUTIER finds in the similar French custom a "reminiscence" of the marriage *per solidum et denarium* of the Salic law. "When the bridegroom pronounces these words: '*De mon bien je vous doue*,' he delicately places in the little purse of the bride three pretty pieces of money, three new *deniers*. Not being able to put into her hands the fields, woods, and manors constituting the dower, he gives her its symbol. They went so far on account of this usage as to coin special *deniers*, 'deniers pour espouser'": *La chevalerie*, 428.

jungo[1] are unknown. It is the "parties who marry themselves." The matrimonial contract arises solely in their consent.[2]

II. THE PRIEST SUPERSEDES THE CHOSEN GUARDIAN, AND *SPONSALIA PER VERBA DE PRAESENTI* ARE VALID

Thus it appears that between the first and twelfth centuries the religious element in the marriage ceremony runs through three phases, not sharply defined by dates, but overlapping and blending; and for the sake of clearness it may be well to summarize the history of this development before proceeding farther. (1) During about four centuries no liturgy was prescribed; the ancient popular forms of contract were accepted; the nuptials were usually celebrated in the home of the bride, less often in church; and the priestly benediction, though doubtless commended as a religious duty, was not exacted by the church as essential to a legal or a canonical marriage. (2) Between about the end of the fourth century and the middle of the tenth the custom became well established for the newly wedded pair to attend religious service in the church to partake of the sacrament and receive the priestly benediction on their future married life; and this practice soon led to the institution of the regular bride-mass, containing phrases directly applicable to the nuptials. In the bride-mass may be found the genesis of the ecclesiastical marriage liturgy; but it is a purely religious office and adds nothing to the validity of the private contract. (3) In the next phase, falling between the tenth and the twelfth centuries, the clergy makes rapid progress. An elaborate and imposing ritual is developed; the

[1] "I pronounce that they be man and wife together, in the name of the Father," etc.: Ritual of the English church, in BINGHAM, *Christian Marriage Ceremony*, 166. "I join you together in marriage," etc.: Roman ritual, *ibid.*, 178. The presence of similar phrases in all our modern ceremonies, civil or religious, is a striking proof of the essential difference between the function of the magistrate or priest now and that of his mediæval predecessor.

[2] LÉON GAUTIER, *La chevalerie*, 426 n. 1; *ap.* MARTENE, *De ritibus.*

priest, inheriting the functions of the ancient orator, directs the entire celebration; the nuptial ceremony takes place before the church door, and is followed by the bridal mass in the church itself; but even now the priest is a mere helper, and the religious service adds nothing to, nor its omission takes nothing from, the validity of the nuptial contract.

The next and final step is comparatively easy and already assured. By the beginning of the thirteenth century the western church had entered upon a fourth phase in respect to the solemnization of marriage. This was facilitated, according to Sohm,[1] by the custom, already mentioned, of choosing any third person as guardian to officiate at the nuptials, marking the transition from the ancient tradition through the natural guardian to the stage of self-*gifta* or tradition by the bride herself—a stage which is fairly being entered upon at the beginning of the thirteenth century. This new and more liberal form of lay tradition led directly to the *gifta* by the priest, or to ecclesiastical marriage properly so called.[2] In the third stage of development the priest could not venture to interfere with the prerogative of the natural guardian to give his ward in marriage. He could at most assist as orator and bestow his benediction. But from the moment that custom sanctioned the choice of any third person in place of the father or other natural protector, the clergy appropriated this function as their exclusive right. While the church "bestowed her blessing upon the tradition through the natural guardian, she directed against the lay chosen guardian her excommunication."[3] So at this point arose the antagonism between private and ecclesiastical marriage.[4] The motive of the church was

[1] SOHM, *Eheschliessung*, 164 ff., 67 ff.; *cf.* FRIEDBERG, *Eheschliessung*, 94 ff.

[2] SOHM, *op. cit.*, 164.

[3] *Ibid.*, 164 ff., 179 ff.

[4] The ecclesiastical act, *Handlung*, was old; the ecclesiastical nuptials, *geistliche Trauung*, was new. This is SOHM's view, *op. cit.*, 179 ff., 183, as opposed to FRIEDBERG, *Eheschliessung*, 85.

clearly twofold. While she very naturally strove to gain control of the nuptial celebration, to give more and more a religious form to the institution already declared by her to be a sacrament, she doubtless foresaw something of the evils which would ensue from clandestine or private unions, now that the consent of the parent or natural guardian was no longer necessary, as in early days, for a valid marriage, and therefore began to legislate in the interest of publicity.

Henceforth the rituals of the continent show plainly that marriage was usually celebrated by the priest and not merely in his presence; though the ceremony still takes place at the church door. The parties no longer simply "marry themselves," repeating after the priest the solemn words of the nuptial vow; but in addition the priest "gives the woman to the man, saying in Latin words: I join you in the name of the Father, the Son, and the Holy Ghost. Amen;" and this formula, taken from a typical French ritual of the fourteenth century,[1] is never found, as already explained, in the liturgies of the preceding period. It is highly important to note that these words of power on the part of the priest do not appear in the English service before the period of the Reformation. In the earlier as well as in the later rituals the parties are the real actors, although the priest is leader and teacher in the whole ceremony. At most, so far as the form

[1] "Tunc sacerdos det eam viro dicens verbis latinis: Et ego conjungo vos in nomine Patris et Filii et Spiritus Sancti. Amen": quoted in SOHM, *op. cit.*, 165, 166, from a Rouen ritual of the fourteenth century in Martene's collection. DIECKHOFF, *Die kirch. Trauung*, 82 ff., takes a different view. The Rouen ritual, he holds, is not a typical service. The priest does not now gain an essentially new function at the nuptials. His office has always been necessary to a Christian marriage. In addition to his original power of joining in wedlock, he merely adds the function exercised by the father or guardian in the formal tradition. Moreover, Dieckhoff's position is supported by some rituals, which seem to show that development on the continent was not uniform in this regard. *Cf.* SCHEURL, *Entwicklung*, 110 ff., who discusses the divergent views of Sohm and Friedberg.

The last stage of evolution has not yet been reached in the eastern church. In the presence of the priest the bride and groom betroth and give themselves in marriage. The priest merely prays and blesses: SOHM, *Zur Trauungsfrage*, 19 ff.; ZHISHMAN, *Das Eherecht*, 128, 135, 692 n. 1, 694 n. 1. For the marriage ritual of the Greek church see MARTENE, *De ritibus*, II, 140-44.

of tradition is concerned, evidence of a mere transition[1] from the third phase in the rise of ecclesiastical marriage may be discerned. The priest does not step quite into the place of the father or other relative. He is not quite a "chosen guardian;" for he receives his power to "give" the bride to the bridegroom from the natural guardian or his representative, and not from the woman herself. Thus, according to the ancient liturgy of York, the priest says, "who gyues me this wyfe? Then the woman is given by her father or by a friend;"[2] and this transitional form in substance is still preserved in the modern service of the English church.[3] But, apparently, the function of the priest in the *gifta* is more pronounced in the York manual than in any of the other mediæval rituals which have been preserved. In some of them, as a matter of fact, it receives no mention at all.[4]

[1] Pointed out by SOHM, *Eheschliessung*, 164, 165.

[2] Surtees Society *Publications*, LXIII, 26.

[3] "Who giveth this woman to be married to this man? Then shall they give their troth to each other in this manner. The minister receiving the woman at her father's or friend's hands," etc.: BINGHAM, *The Christian Marriage Ceremony*, 164.

[4] Thus the Hereford ritual simply says, after declaration of the dower, "et pater vel propinquus mulieris accipiat eam, et tradat homini per manum dexteram" (Surtees Society *Publications*, LXIII, Appendix, 116). Similarly the Pontifical of Anianus, bishop of Bangor, of the thirteenth century declares, "Primo dicatur (dos) feminae, deinde detur" (*ibid.*, 162); and this form agrees substantially with that of the Hanley Castle Missal of the same period (*ibid.*, 163). In the ritual of the fifteenth-century Harleian MS., in the British Museum, after asking the banns, "the woman shall be given in this manner: Sacerdos utriusque manu dextera apprehensa, jungat eos similiter, sicut faciunt qui fide se obligant" (*ibid.*, 166); but here, of course, the words "jungat eos" are not words of power, for they precede the marriage vow of the parties. According to the Welsh ritual of the fifteenth century, "the woman is given by her father or by another friend" (*ibid.*, 167); and this form is observed in the Sarum liturgy published both by MASKELL (*Monumenta*, I, 56), and the Surtees Society (LXIII, Appendix, 19), while in one MS. of the same service the words "deinde detur [Ecclesiae] femina a patre suo, vel ab amicis ejus" (*ibid.*, *loc. cit.*, 19) appear, thus in effect agreeing with the form of the York manual. An interesting variation occurs in the Pontifical of Magdalen College, Oxford, of the twelfth century, where the priest does not *receive* the woman from her guardian, but *joins with him* in giving her to the husband: "Sacerdos et patronus sponsae dent ipsam sponso per dexteram" (*ibid.*, 160). A ritual of Arles (*ca.* 1300) affords evidence of a similar transition in the form of tradition: see the extract in SOHM, *Eheschliessung*, 165 n. 27; and compare on this subject FRIEDBERG, *Eheschliessung*, 38, 62. On the English celebration *cf.* JEAFFRESON, *Brides and Bridals*, I, 88–98.

It appears, then, as regards the form of celebration, that previous to the Reformation the church had not made so great progress in England as in many places on the continent. The *gifta* is still essentially the ancient private tradition, in which the priest has at most a subordinate place; and the words of power following, and as it were sealing, the nuptial vow do not appear. Still there is a decided gain; for the whole procedure is given a religious character through the solemn prayers and benedictions, the authoritative definitions of the nature of marriage, and the stately ceremonial of the bridal mass, in all of which the priest is the central figure.

If now, turning from the evidence afforded by the content of the prescribed rituals, we examine the legislation of the church for enforcing the acceptance of these rituals, we shall reach a similar result. Stated broadly in advance, the English canons created a sharp distinction between legality and validity. Lay marriages—that is, marriages solemnized without the intervention of the church, including clandestine unions as well as those privately contracted before witnesses with parental consent—were opposed to canonical marriages: and lay marriages were declared illegal under severe penalties, even excommunication; while at the same time, if once contracted in words of the present tense, they were maintained as equally valid and equally sacramental in their nature with those celebrated according to the authorized liturgy before the priest.[1]

During the Anglo-Saxon period various orders and regulations commanding the benediction were passed. Theodore

[1] In general, for the canons relating to the priestly benediction and the ecclesiastical celebration see JOHNSON, *Collection of the Laws and Canons of the Church of England*, I, 202; II, 19, 27, 64, 89, 91, 340, 395, 410; PEMBERTON'S historical summary in 10 CLARK AND FINNELLY, 616 ff.; and the summaries of MASKELL, *Monumenta ritualia*, I, cclxiv-ix; and MAKOWER, *Const. Hist. of Church of England*, 213, 214 n. 5. For the early period see the collections of Thorpe, Schmid, Haddan and Stubbs, and Wilkins. An excellent discussion of the subject is given by POLLOCK AND MAITLAND, *Hist. Eng. Law*, II, 364 ff.; and a very detailed treatment in FRIEDBERG'S *Eheschliessung*, 33 ff., 309 ff.

thus requires the priest, in the case of a first marriage, to celebrate the mass, doubtless the ordinary service, and to ask a benediction upon both parties;[1] while by the ritual of the tenth century, already quoted, the nuptials are to be celebrated before a mass-priest "who shall with God's blessing bind their union to all prosperity."[2] But after the Conquest more stringent measures were taken to secure publicity and enforce the observance of religious rites. Especially important is the celebrated constitution of Archbishop Lanfranc, alleged to have been enacted at the Council of Winchester in 1076, ordaining "that no man give his daughter or kinswoman in marriage without the priest's benediction," and declaring that otherwise "the marriage shall not be deemed legitimate but as fornication."[3] Twenty-six years later, at the Council of London, an attempt was made by Anselm to put a check upon clandestine contracts, in a provision which really defines the principle governing the decisions of the ecclesiastical courts throughout the west. "Promises of marriage made between man and woman without witnesses" are declared to be "null if either party deny them."[4] In 1175 these acts were reinforced by a canon of Archbishop Richard, taken from the decrees of Pope Ormisdas (Hormisdas) of the

[1] *Poenit. Theod.*, Book I, c. 14, § 1: HADDAN AND STUBBS, *Councils*, III, 187; MAKOWER, *Const. Hist. Church of Eng.*, 213, 214 n. 5.

[2] SCHMID, *Gesetze*, Anhang VI, 392, 393; THORPE, *Ancient Laws*, I, 255-57; MAKOWER, *loc. cit.* *Cf.* also the *Excerptiones Ecgberti*, c. 90 (or 88), THORPE, II, 110, reproducing a canon of the Council of Carthage requiring that "the bridegroom and bride be offered by the parents, and bridefolk, to receive the priest's benediction": JOHNSON'S *Canons*, I, 202, and the so-called *Canones Ælfrici* (A. D. 992-1001), sec. 9, in THORPE, II, 347, declaring that "the layman may, however, with the apostle's leave take a wife a second time; if his wife falls away from him; but the canons forbid blessing thereto and have ordered such men to do penance": MAKOWER, *loc. cit.*

[3] "Praeterea statutum est, ut nullus filiam suam, vel cognatam, det alicui, absque benedictione sacerdotali. Si aliter feceret, non ut legitimum conjugium, sed ut fornicatorium, judicabitur."—PARKER, *De antiquitate britannicae ecclesiae* (London, 1729), 173; also WILKINS, *Concilia*, I, 367; MAKOWER, *loc. cit.*; and translated in JOHNSON'S *Canons*, II, 19. *Cf.* POLLOCK AND MAITLAND, *Hist. Eng. Law*, II, 368 n. 2.

[4] "Ut fides inter virum et mulierem, occulte et sine testibus, de conjugio data, si ab alterutro negata fuerit, irrata habeatur."—WILKINS, *Concilia*, I, 382; JOHNSON, *Canons*, II, 27; MAKOWER, *loc. cit.*

year 514, ordering that "no faithful man, of what degree soever, marry in private, but in public, by receiving the priest's benediction. If any priest be discovered to have married any in private let him be suspended from his office for three years."[1] By a constitution of Archbishop Walter, in the year 1200, it was further ordained that "no marriage be contracted without banns thrice published in church, nor between persons unknown;" and no marriage not publicly solemnized in face of the church is "to be allowed of, except by the special authority of the bishop."[2]

These measures, and others later enacted in a similar spirit,[3] have led to a serious misapprehension of the real doctrine of the canon law. From them it has been zealously argued that the prescribed religious celebration was essential to a valid contract; and this view was strengthened by the decree of Innocent III. at the fourth Lateran council, 1215, requiring the publication of banns as a general law of the western church, which by a similar error was understood to have ordained ecclesiastical marriage.[4] But in the light of history it seems clear that all which was intended by this decree, or by the constitution of Lanfranc and its successors, was to declare the unblessed marriage illegal, involving certain penalties or disadvantages, without touching its validity.[5] The lay courts, as will appear in the next

[1] JOHNSON, *Canons*, II, 64. [2] *Ibid.*, 91.

[3] Especially the constitution of Reynolds, 1322; that of Stratford, 1343; and that of Zouche, 1347: *ibid.*, 340, 341, 395, 410, 411.

[4] FRIEDBERG, *Eheschliessung*, 39, note, gives a list of the authors making this mistake. "This belief is stated by Blackstone, *Comment.*, I, 439, and was in his time traditional among English lawyers. Apparently it can be traced to Dr. Goldingham, a canonist who was consulted in the case of Bunting *v.* Lepingwell (Moore's *Reports*, 169)": POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 368, 369, note; FRIEDBERG, *op. cit.*, 314.

[5] Even the words of Lanfranc, strong as they are, do not invalidate an unblessed marriage. "He does not say that the union will be mere fornication; he says that it will be *coniugium fornicatorium*, an unlawful and fornicatory marriage. Lanfranc's words recall those of the Pseudo-Isidorian Evaristus which appear in c. 1, C. 30, q. 5": POLLOCK AND MAITLAND, *op. cit.*, II, 368 n. 2; FREISEN, *Geschichte des can. Eherechts*, 139.

chapter, might deny full rights of dower and inheritance to the issue of such unions; but after the thirteenth century, as well as before, marriages celebrated without the intervention of priest or magistrate were sustained by the church as binding. As already emphasized at the outset of this discussion, the private, even secret, agreement of the parties, without consent of parent or guardian, if expressed in words of the present tense, *sponsalia per verba de praesenti*,[1] though not followed by cohabitation, was held to constitute a valid marriage; and it could be sustained against a subsequent contract publicly celebrated according to ecclesiastical forms and followed by years of wedded life. This is unquestionably the doctrine of the canon law of western Christendom, as emphatically expressed in the decretal epistle of Alexander III. to the bishop of Norwich presently to be noticed;[2] and that it was accepted by the English courts as a part of the law of the land is established by conclusive evidence. Not until the Council of Trent, in the middle of the sixteenth century, was there any general legislation of the church to enforce ecclesiastical rites. This council, after anathematizing those who deny that clandestine marriages theretofore contracted by the sole agreement of the parties and without parental consent are "true and valid," decreed, contrary to the opinion of fifty-six prelates,

[1] For some account of the distinction between *sponsalia de praesenti* and *de futuro*, with references, see the next chapter.

[2] This epistle sustained a marriage by private consent as against one subsequently contracted and consummated. The opposing view is thus set forth by Pemberton in The Queen *v.* Millis: "In 1160 Pope Alexander issued edicts in which marriages without the presence of a priest were declared good; but almost immediately afterwards came the canons already cited [those of 1175 and 1200 mentioned in the text], to guard against the abuse of the permission thus given by the pope. But from what follows it is clear that the law which admitted the canon law in other countries, as part of the law of the land, was never adopted in England. In 1253 the attempt was made to introduce the canon law of marriage recognized by the popes, against the ecclesiastical law of England and the answer was the well-known answer that the barons would not consent to have the laws of England changed": 10 CLARK AND FINNELLY, 617. This is a strange perversion of the truth: see POLLOCK AND MAITLAND, *op. cit.*, II, 370 n. 1.

that thenceforward all marriages not contracted in the presence of a priest and two or three witnesses shall be void.[1] This decree was not accepted in England, and "clandestine" marriages continued to be valid until the middle of the eighteenth century; and until 1856, in Scotland, as is well known, the mere consent of the parties, however expressed, constituted a binding marriage.[2]

It follows that the unanimous opinion of the English judges in the great case of the Queen *v.* Millis, 1844, against the validity of a marriage not celebrated before an ordained priest of the established church, is not supported by the evidence of history as revealed in the doctrines of the canon law and in the action of the ecclesiastical courts during six centuries.[3] The following are the main facts in the history of this famous suit: In January, 1829, at Banbridge, county of Down, Ireland, George Millis and Hester Graham "entered into a contract of present marriage" in the presence of John Johnstone, the "placed and regular

[1] BOHN, *Pol. Cyc.*, III, 319, 320. FRIEDBERG, *Eheschliessung*, 123, 124, gives the text of the decree; and his second book, 101–50, contains an interesting history of the proceedings of the council on the subject of marriage. An English version of the text of the decree may be found in WATERWORTH, *Canons and Decrees of the Council of Trent*, 196–99, who also describes the proceedings (CCXXI–XXXVI). *Cf.* SALIS, *Die Publikation des trid. Rechts der Eheschliessung*, 2 ff.; FLEINER, *Die trident. Ehevorschrift*, 1 ff.; ESMEIN, *Le mariage en droit canonique*, II, 119–37; MADAN, *Thelyphthora*, III, 238 ff. SOHM, *Eheschliessung*, 187–96, shows that the Tridentinum still maintains the Germanic principle of *consensus* as the valid marriage.

For the sources see the collections of Theiner and Richter-Schulte and the works of Sarpi and Pallavicino mentioned in Bibliographical Note VII.

[2] On Scotch marriages see EDGAR, *Marriages in Olden Times*, 134–203; WALTON, *Scotch Marriages;* GEARY, *Marriage and Family Relations*, 534 ff.; HAMMICK, *The Marriage Law*, 221 ff.; FRIEDBERG, *Eheschliessung*, 57, 58, 426, 427, 437–59; BOHN, *Pol. Cyc.*, III, 326; STEPHENS, *Laws of the Clergy*, I, 672, 688; ROBERTSON, *Encyc. Britannica*, XV, 567; KENT, *Commentaries*, II, 90. *Cf.* especially the case of Dalrymple *v.* Dalrymple, in 2 HAGGARD'S *Consistory Reports*, 54–137.

[3] See the cases mentioned in the Bibliographical Note at the head of this chapter. Of course, most of the decisions are cited and elaborately discussed by the counsel and judges in Queen *v.* Millis and Beamish *v.* Beamish. An important case is given in *Harvard Law Review*, VI, 11. *Cf.* SWINBURNE, *Of Spousals*, 13, 104, 193, *passim;* and especially HALE'S *Precedents and Proceedings in Criminal Laws*, *1475–1640*, taken from the act-books of ecclesiastical courts in the diocese of London, and containing a mass of most interesting and convincing evidence relating to the subject (see the Index at "Matrimonial Causes").

minister of the congregation of Protestant dissenters commonly called Presbyterians, at Tullylish, near Banbridge," who performed a solemn religious ceremony according to the usual rites of his sect. Thus there was a perfect and binding contract *de praesenti* according to ecclesiastical law. Later, while Hester was still living, Millis married Jane Kenedy in England, using the forms of the established church, of which he was a member. At the spring assizes of 1842, for the county of Antrim, Ireland, Millis was indicted for bigamy. The case was removed by *certiorari* into the Irish court of Queen's Bench, where the four judges were evenly divided; but Justice Perrin, who favored the validity of the first marriage, withdrew his opinion *pro forma*, that the case might go to the House of Lords for definite settlement.[1] The Lords submitted the case to the English judges for advice; and they unanimously decided against the validity of the first marriage on the ground that it had not been celebrated before a regular clergyman of the English church. That the decision was hasty and in direct opposition to history, as revealed in all the great cases, there can now be small doubt. "We have here," says Bishop, "a question of almost pure ecclesiastical law, submitted to a tribunal composed of common-law and equity lawyers, who necessarily possessed little or no knowledge of the subject. So they ask advice, not from the ecclesiastical judges, whose functions had qualified them to give it, but from the uninstructed common-law judges. The latter were competent to learn, but they were not allowed the necessary time. Lord Chief-Justice Tindal, who delivered their opinion, complained of the want of time for investigation; and the opinion throughout shows the complaint to have been well founded."[2]

This view is strongly supported by the action of the

[1] For the record of the proceedings in Ireland see *Report of the Cases of Regina v. Millis, et Regina v. Carroll in the Queen's Bench in Ireland* (Dublin, 1842).

[2] BISHOP, *Mar., Div., and Sep.*, I, §§ 400, 401.

Lords. In spite of the united opinion of the judges, the final deliberation of the six law peers resulted in a tie: Lords Cottenham, Abinger, and Chancellor Lyndhurst holding the first marriage to be void; and Lords Brougham, Denman, and Campbell maintaining its validity. But since the case was on appeal from the decision of another court, the result of the tie was to declare the invalidity of unblessed wedlock.[1]

Thus by a remarkable sequence of circumstances and accidents was established the judicial interpretation of the English law governing the marriage celebration.[2] The decision was therefore followed in another celebrated case, that of Beamish *v.* Beamish, which came before the House of Lords in 1861. This was a case of "clandestine" marriage, the bridegroom himself performing the ceremony in a private house according to the ritual of the established church. In the record we are told that the "Rev. S. S. Beamish, in the year 1831, became attached to a young lady named Isabella Frazer (both being members of the United Church of England and Ireland), and as he did not obtain his father's consent to his marriage with her, he persuaded her into a clandestine marriage, which, according to the special verdict found in the case, was performed in the following manner: 'On the 27th November, 1831, the Rev. Samuel Swayne Beamish, being then a clergyman in holy orders, went to the house of one Anne Lewis, in the city of Cork, and there performed a ceremony of marriage between himself and Izabella Frazer, by reading between them . . . . the form of solemnization of matrimony used in said United

[1] The case is given in 10 CLARK AND FINNELLY, *Reports of Cases Decided in the House of Lords*, 534-907. The text of the opinion of the English judges may also be found in STEPHENS, *Laws of the Clergy*, I, 675-94. It was ably refuted by SIR JOHN STODDART in his *Observations on the Opinion* and his *Letter to Lord Brougham* (both London, 1844).

[2] In 1844, by the act of 7 and 8 Victoria, c. 81, the essential features of 6 and 7 Will. IV, c. 85, which had made the public observance of ecclesiastical or civil forms necessary to a valid marriage in England, were extended to Ireland; and this was the result of the excitement caused by the case of the Queen *v.* Millis of the same year.

Church of England and Ireland, as set forth in the Book of Common Prayer, ... by declaring' in words of the present tense that he took the bride 'to his wedded wife,' she making a similar avowal; by placing a ring on her finger; and by pronouncing the blessing in the appointed form." The court held the contract void, declaring that, since it was "settled by the decision in the Queen *v.* Millis, that to constitute a valid marriage by the common law of England, it must have been celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself a clergyman in holy orders, there being no other clergyman present, will not make the marriage valid." For "as to the manner in which a marriage is to be celebrated, the law does not admit of any difference between the marriage of a clergyman and of a layman."[1]

The singular motives underlying this decision have been recently discussed in an instructive way by Sir Frederick Pollock. It appears that a former judgment of the Lords must be maintained, however absurd or however inconsistent with history or justice it is felt to be. Already in 1852 and again in 1860 Lord Chancellor Campbell had committed himself to the dogma that the House of Lords is bound by its own decisions. At the former date, answering Lord St. Leonards, who holds the opposite view, he says: "I consider it the constitutional mode in which the law is declared, and that after such a judgment has been pronounced it can only be altered by an Act of the Legislature."[2] When the case of Beamish *v.* Beamish came "before the House of Lords, the late Mr. Justice Willes virtually, though not professedly, demonstrated, in a full and most learned opinion,

[1] Case of Beamish *v.* Beamish in 9 *House of Lords Cases*, 274-358. The report in this case, like that in Queen *v.* Millis, constitutes an extended history of English matrimonial law.

[2] In Bright *v.* Hutton, 3 *H. L. C.*, 391, 392. For his opinion in 1860 see A.-G. *v.* Dean and Canons of Windsor, 8 *H. L. C.*, 391-93.

that the supposed difference between the law of England and that of the rest of western Christendom was imaginary. His reasons convinced Lord Campbell and Lord Wensleydale, but Lord Campbell declared himself not at liberty to act on his conviction;" though, for sound reasons which he admits, he confessed that if competent for him he would ask their Lordships to reconsider their judgment in the Queen *v.* Millis. "But it is my duty," he adds, "to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*." A "rule of law thus judicially expressed must be taken as for law till altered by an act of Parliament." The "law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this house would be arrogating to itself the right of altering the law, and legislating by its own separate authority." It "may seem startling," comments Pollock, "that questions of legitimacy and property should be treated as irrevocably settled by the result of an equal division of the House of Lords, on argument and information admittedly imperfect with regard to the history of the law; that result, moreover depending on the accident of the form in which the appeal was presented: but so they were." Thus in Beamish *v.* Beamish an opinion of seventeen years earlier was accepted as binding, "which in 1861 was believed by a majority of the House of Lords and the judges who advised them, and is now believed by most competent scholars, to be without any real historical foundation."[1]

[1] Following POLLOCK, *First Book of Jurisprudence* (London, 1896), 311–17.

In general, on these decisions and those preceding see the masterly discussion of FRIEDBERG, *Eheschliessung*, 39–57, 427, 464 ff. His conclusions are supported by SOHM, *Eheschliessung*, 125 ff.; POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 367 ff.; and by the article of ELPHINSTONE, in *Law Quarterly Review*, V, 49 ff. Compare REEVES, *Hist. of the Common Law*, IV, 52 ff.; BISHOP, *Marriage, Divorce, and Separation*, II, 171, 172; KENT, *Commentaries*, II, 87 ff., notes; BRIGHT, *Husband and Wife*, II, 398. These judgments are regarded as historically just by DIECKHOFF, *Die kirch. Trauung*, 70, note; and COOK, "The Marriage Ceremony in Europe," *Atlantic*, LXI.

CHAPTER VIII

RISE OF ECCLESIASTICAL MARRIAGE: THE CHURCH DEVELOPS AND ADMINISTERS MATRIMONIAL LAW

[Bibliographical Note VIII.—For the evolution of the canonical theory of marriage the Richter-Friedberg *Corpus juris canonici* (Leipzig, 1881 ff.), Peter Lombard's *Sententiae* (Incunabula, *Textus sententiarum*, 1488, Sutro Library), and the *Ante-Nicene Fathers* (Buffalo, 1885–87) are of the first importance. The collections of Haddan and Stubbs, Thorpe, Schmid, Hale, and Johnson, mentioned in Bibliographical Note VII, are available for this chapter; as are also the collections of Richter-Schulte, Theiner, and Waterworth, the works of Sarpi and Pallavicino, the monographs of Salis, Fleiner, Riedler, and Leinz, the papers of Meurer and Schulte, with the other authorities already cited for the Council of Trent. Well-known treatises on the canon law are Lyndwood, *Provinciale* (ed. of 1505 and Oxford, 1679); Sanchez, *Disputationum de st^o^ matrimonii sacramento* (Venice, 1625); and Godolphin, *Repartorium canonicum* (3d ed., London, 1687). With these may be used Smith, *Elements of Ecclesiastical Law* (New York, 1882); Phillimore, *Ecclesiastical Law* (London, 1873–76); Stephens, *Laws Relating to the Clergy* (London, 1848); Burn, *Ecclesiastical Law* (London, 1842); and the excellent summary of Geary, *Marriage and Family Relations* (London, 1892), chap. xvi, where the principal sources are mentioned. Dodd's *History of the Canon Law* (London, 1884) is too general to be of much service. A good handbook of Catholic doctrine, with full citation of authorities, is Gury's *Compendium of Moral Theology;* and in this connection may also be consulted Amat's convenient *Treatise on Matrimony* (San Francisco, 1864); the works of Cigoi, Didon, Roskovány, Perrone, and Scheicher-Binder described in Bibliographical Note XI.

The rise of the system of enforced celibacy of the clergy, with the consequent evils, is most fully treated by the brothers Theiner, *Die Einführung der erzwungenen Ehelosigkeit* (3d ed., Barmen, 1891–98), whose book, first published in 1828, has been fiercely attacked by Catholic critics; and Lea, *Sacerdotal Celibacy* (2d ed., Boston, 1884); supplemented by his *History of Auricular Confession and Indulgences in the Latin Church* (Philadelphia, 1896). The immorality of the mediæval clergy is also described by Bouvet, *De la confession et du célibat des prêtres* (Paris, 1845); Gage, *Woman, Church, and State* (Chicago,

1893); *idem*, an article under the same title in *History of Woman Suffrage* (New York, 1881); Lecky, *History of European Morals* (3d ed., New York, 1881); and Huth in the third chapter of *Marriage of Near Kin* (2d ed., London, 1887). For a later period the subject is dealt with by Michelet, *Le prêtre, la femme, et la famille* (new ed., Paris, 1889); and "A. F. R.," *Betrachtungen über den Klerikal- und Mönchsgeist im neunzehnten Jahrhundert* (1805). In this connection see also Bucksisch, *De apostolis uxoratis* (new ed., Wittenberg, 1734); Essich, *De clericis maritis dissertatio historica* (Augusta Vindelicorum, 1747); Feyerabend, *De privilegiis mulierum* (Jena, 1667); *Recherches philosophiques et historiques sur le célibat* (Geneva, 1781); *De l'institution du célibat* (Paris, 1808); Klitsche, *Geschichte des Cölibats . . . . zum Tode Gregor's VII.* (Augsburg, 1830); Lind, *De coelibatu christianorum per tria priora secula* (Havniae, 1839); the anonymous *Letters on the Constrained Celibacy of the Clergy* (London, 1816); Zimmermann, *Der Priester-Cölibat* (Kempten, 1899), presenting the loyal Catholic point of view; and the monograph of Schulte, *Der Cölibatszwang und dessen Aufhebung* (Bonn, 1876). A favorable view of the conventual life is taken by Eckenstein, *Woman under Monasticism* (Cambridge, 1896); and curious monuments of the contempt for woman produced by asceticism are the books of Valens Acidalius and his adversary Simon Geddicus, mentioned in a footnote below. For the controversy in France regarding the validity of the marriage of a priest under the temporal law see Nachet, *Liberté du mariage des prêtres: Mémoire produit à la Cour de Cassation pour M. Dumonteil* (Paris, 1833); and Horoy, *Du mariage civil du prêtre en France* (Paris, 1890).

The manifold evils arising from the canonical distinction between *sponsalia de praesenti vel futuro* are best described in the vigorous words of Martin Luther. In particular should be read the thirty-sixth chapter of the *Tischreden* (folio, Frankfort, 1571), and the *Von Ehesachen: Werke*, XXIII (Erlangen ed.) or Vol. V in *Bücher und Schriften* (Jena, 1555–80). The quaint and learned book of Swinburne, *Of Spousals* (London, 1686), contains a striking passage bearing on the subject; while for the mediæval English law should be consulted Glanville's *Tractatus;* Bracton's *De Legibus* (ed. Twiss, London, 1878–83); *idem*, *Note Book* (ed. Maitland, London, 1887); and Maitland's *Select Pleas of the Crown.* With Sohm's view as to the essential identity in form of the two kinds of *sponsalia* compare the various works of Biener, Bierling, Sehling, Scheurl, and Dieckhoff mentioned in Bibliographical Note VII. The text of Master Vacarius's *Summa de matrimonio* is edited by Maitland in *Law Quarterly Review*, XIII (London, 1897); and in the same volume he discusses Vacarius's theory of marriage, differing essentially from that of Gratian or Lombard. Assistance may also be had from Weber, *De vera inter sponsalia de praesenti et nuptias differ-*

entia (Parchimi, 1825); Hoffmann, *De aetate juvenili contrahendis sponsalibus* (Regiomonti et Lipsiae, 1743); Lipold, *Arbor consanguinitatis et affinitatis* (n. p., n. d.); Niemeier, *De conjugiis prohibitis dissertationes* (Helmstadt, 1705); Born, *De bannis nuptialibus* (Leipzig, 1716); and the dissertations on parental consent and clandestine marriage mentioned in Bibliographical Note IX.

Remarkable testimony as to the existence of clandestine marriage in England during the first half of the sixteenth century is given by Richard Whitforde, *A Werke for householders* (1530; 2d ed., 1537); and in Miles Coverdale's translation of Bullinger's *Christen State of Matrimonye* (1st ed., 1541, in British Museum).

Indispensable guides for the study of the entire subject are still the works of Sohm, Friedberg, and Pollock and Maitland; but by far the best systematic histories of canon-law marriage are Freisen's *Geschichte des canonischen Eherechts* (Tübingen, 1888; Paderborn, 1893); and Esmein's masterly *Le mariage en droit canonique* (Paris, 1891). A similar work for the eastern church is Zhishman's *Das Eherecht der orientalischen Kirche* (Vienna, 1864). Illustrative decisions are communicated by Frensdorff, "Ein Urtheilsbuch des geistlichen Gerichts zu Augsburg aus dem 14. Jahrhundert," in *ZKR.*, X (Tübingen, 1871); and Loersch, "Ein eherechtliches Urtheil von 1448," *ibid.*, XV (Freiburg and Tübingen, 1880). There is an article on the beginnings of ecclesiastical jurisdiction by Sohm, "Die geistliche Gerichtsbarkeit im frankischen Reich," *ibid.*, IX (Tübingen, 1870). Wunderlich has a serviceable edition of Tancred's *Summa de matrimonio* (Göttingen, 1841); and among the works relating to special questions are Sehling, *Die Wirkungen der Geschlechtsgemeinschaft auf die Ehe* (Leipzig, 1885); Heinlein, *Die bedingte Eheschliessung* (Vienna, 1892); Andreae, *Einfluss des Irrthums auf die Gültigkeit der Ehe* (Göttingen, 1893); Eichborn, *Ehehinderniss der Blutsverwandtschaft* (Breslau, 1872); Gerigk, *Irrtum und Betrug als Ehehinderniss* (Breslau, 1898); Benemann, *De natura matrimonii* (Halle, 1708); Baier, *Die Naturehe in ihrem Verhältniss zur . . . . christlich-sakramentalen Ehe* (Regensburg, 1886); Hahn, *Die Lehre von den Sakramenten* (Berlin, 1864); and the standard Catholic treatise of Oswald, *Die dogmatische Lehre von den heiligen Sakramenten* (5th ed., Münster, 1894).

In general, besides the works of Gide, Loening, Combier, Tissot, Burn, Thwing, Blackstone, Jeaffreson, Lingard, Makower, Madan, and Morgan, elsewhere described, the following have been drawn upon in various connections: Wasserschleben, *Bussordnungen* (Halle, 1851); Schmitz, *Bussbücher* (Mainz, 1883); Lobethan, *Einleitung zur theoretischen Ehe-Rechts-Gelarhtheit* (Halle, 1785); Schott, *Einleitung in das Eherecht* (new ed., Nuremberg, 1802); Goeschl, *Ehegesetze* (Aschaffenburg, 1832); Stäudlin, *Geschichte der Vorstellungen und Lehren von*

derEhe (Göttingen, 1826); Palgrave, *English Commonwealth* (London, 1832); Kemble, *Saxons in England* (London, 1876); Ellis, *Introduction to Domesday Book* (Record Commission, 1833); Bigelow, *Placita anglo-normannica* (Boston, 1881); Stubbs, *Select Charters* (Oxford, 1881); *idem, Constitutional History* (Oxford, 1875–78); *idem, Seventeen Lectures* (Oxford, 1886); Denton, *England in the Fifteenth Century* (London, 1888); Traill, *Social England* (New York, 1898); Nisbet, *Marriage and Heredity* (London, 1888); Smith, *The Parish* (London, 1857); Kent, *Commentaries* (Boston, 1873); Gibbon, *Decline and Fall* (London, 1830); and some of the Reformation writers referred to in Bibliographical Notes IX and XI.]

I. THE EARLY CHRISTIAN DOCTRINE AND THE RISE OF THE CANONICAL THEORY

IT was most unfortunate for civilization that the Christian conception of the nature of marriage should have sprung from asceticism, and that the verbal subtlety of the schoolmen should have produced the cardinal definitions upon which the validity of marriage contracts, and therefore the practical administration of matrimonial law, were made to depend. The mediæval teaching regarding forbidden degrees, the sacramental nature of matrimony, and the difference between contracts *de futuro* and *de praesenti* are mainly responsible for the shameful abuses which disgrace the record of ecclesiastical judicature previous to the Council of Trent. With regard to an institution upon which in so high a degree the welfare of society depends, anarchy was practically sanctioned by the canon law. Where the utmost clearness and simplicity were needed, obscurity and complexity prevailed; and where publicity was urgently required by the plainest rule of common-sense, there secrecy was in effect invited and rewarded.

The early church was only too ready to take in hand the supervision of marriage and the development of matrimonial law. With regard to the *form*, as already shown, her progress was cautious and slow. Not until the thirteenth century,

as a general rule, does the priest appear with authority as one especially qualified by his religious office to solemnize the nuptials. But long before this, in nearly every other respect save only the betrothal, the church was taking sole possession of the field of matrimonial law and jurisdiction.[1] Yet the institution of marriage was accepted, as it were, under protest. Here and there, of course, the early Fathers admit the purity of the marriage state,[2] but usually with a tone of apology or depreciation which is itself very suggestive of the pervading trend of the ascetic mind. If wedlock be holy, celibacy is much more holy. "It is better to marry than to burn," is a dictum which sounds the keynote of ecclesiastical dogma. "Few texts," declare Pollock and Maitland, "have done more harm than this. In the eyes of the mediæval church marriage was a sacrament; still it was but a remedy for fornication. The generality of men and women must marry or they will do worse; therefore marriage must be made easy; but the very pure hold aloof from it as from a

[1] ESMEIN, *Le mariage en droit canonique*, I, 3, 4, distinguishes the three phases in the growth of the canon law: "D'abord, elle s'est développée à côté du droit séculier, celuici restant indépendant et souverain dans son domaine, et n'a exercé qu'une action parallèle. Dans une seconde phase, elle a supplanté et éliminé le droit séculier, elle seule régissant le mariage dans l'Europe chrétienne. Enfin, devant un reflux puissant de la législation civile, elle a dû, dans le temps moderne, abandonner le terrain qu'elle avait ainsi occupé, pour garder seulement son autorité première, et reprendre son ancienne position."

[2] For examples see IGNATIUS, *Epis. to Philadel.*, c. iv; *Epis. to Polycarp*, c. v, in *Ante-Nicene Fathers*, I, 81, 95; JUSTIN, *First Apol.*, CXV, *ibid.*, 167; ATHENAGORAS, *Plea for Christians*, c. XXXIII, *ibid.*, II, 147; CLEMENT OF ALEX., *ibid.*, 259-63, 377-79. In this last passage Clement is less coarse than usual. "Marriage, then, as a sacred image," he concludes, "must be kept pure from those things which defile it." *Cf.* also TERTULLIAN, *ibid.*, III, 293-95, 443; ORIGEN, *To His Wife*, *ibid.*, IV, 40-44. Compare BUCKSISCH, *De apostolis uxoratis*, 9 ff., who holds that, with the exception of John and Paul, all the apostles had wives. In general, on the development of the early Christian conception of marriage from its Roman and Hebrew beginnings, see FREISEN, *Geschichte des can. Eherechts*, 32 ff.; ZHISHMAN, *Das Eherecht der orient. Kirche*, 93 ff.; SCHULTE, *Der Cölibatszwang*, 5 ff.; THEINER, *Die Einführ. der erz. Ehelosigkeit*, I, 5 ff.; STÄUDLIN, *Geschichte der Vorstellungen und Lehren von der Ehe*, 259 ff.; *Letters on the Const. Celibacy of the Clergy*, 22 ff., 51 ff.; *Recherches phil. et hist. sur le célibat*, 67 ff. On the influence of Paul's teaching see THWING, *The Family*, 47 ff.; and compare NISBET, *Marriage and Heredity*, 33-57, who takes an unfavorable view of the influence of the church as opposed to that of Christianity; and GAGE, *Woman, Church, and State*, 49 ff.; HUTH, *Marriage of Near Kin*, 108 ff.

defilement. The law that springs from this source is not pleasant to read."[1]

Here we have a double paradox, two irreconcilable contradictions, which in due time produced their natural evil fruit. On the one hand, marriage is a sacrament, a holy mystery, yet it rests upon a mere human contract.[2] On the other hand, though possessing a sacramental character, it is but a compromise with lust, from which the saint may well abstain. Hence a premium is placed upon sacerdotal celibacy, though for centuries priests are not absolutely forbidden to marry. Thus in England, at any rate until the

[1] POLLOCK AND MAITLAND, *Hist. Eng. Law*, II, 383. Compare the excellent account of the canonical conception of marriage in ESMEIN, *Le mariage en droit canonique*, I, 63-92. "Enfin, le mariage étant conçu comme un remède à la concupiscence, le droit canonique sanctionnait, avec une énergie toute particulière, l'obligation du devoir conjugal, non seulement dans le *forum internum*, mais encore devant le *forum externum*. De là toute une série de règles que les canonistes du moyen âge exposaient avec une précision minutieuse et une innocente impudeur, et qu'il est parfois assez difficile de rappeler, aujourd'hui que les mœurs ont changé et que l'on n'écrit plus en latin."—*Ibid.*, 84, cited also by POLLOCK AND MAITLAND, II, 383. It is well, for instance, that the editors of the *Ante-Nicene Fathers* have concealed the "innocent immodesty" of Clement of Alexandria (*The Instructor*, c. x, *ibid.*, II, 259 ff.; *Stromata*, Book III, *ibid.*, II, 381 ff.) in the Latin version. The indecency of the Penitentials is so shocking as almost to justify Gibbon's severe epigram that in them "some sins are enumerated which innocence could not have suspected, and others which reason cannot believe."—*Decline and Fall*, chap. lviii, 1070. "I know of no more fatal sources of antichristian error," says Kemble of the Penitentials, "no more miserable records of the debasement and degradation of human intellect, no more frightful proofs of the absence of genuine religion."—*Saxons*, II, 403, 404. See the *Poenitentiale Theodori*, lib. i, c. ii: HADDAN AND STUBBS, *Councils*, III, 178, 179; and especially WASSERSCHLEBEN'S excellent collection of *Bussordnungen*.

The monstrous indecencies of the mediæval confessional are revealed by BOUVET, *De la confession et du célibat des prêtres*, 195 ff. On the other hand, a word of justification may be found in ELLIS, *Psychology of Sex*, I, pp. viii-ix.

[2] The Council of Trent declared marriage to be a sacrament, but did not settle the mediæval dispute as to the relation of its different elements. A strong party held that it is necessary to distinguish between the contract and the sacrament. The church might regulate the former and not the latter, for it was established by Christ himself. This doctrine would logically have led to civil marriage, which the council was not ready to sanction. "In every sacrament a distinction is made between the minister, that is the agent who produces the sacrament, and its *materia*, the objective or real content." From this distinction arose an important controversy; one party regarding the priest, and the other the parties, as the minister of the sacrament. According to the former theory, which was adopted by the French church, the bare consent of the parties constituted the contract, and the marriage gained its sacramental character later through the priestly benediction. The form of valid contract as a temporal matter may therefore be determined by the state. As a direct conse-

days of Dunstan, celibacy had not been strictly enforced in the monastic bodies;[1] and until a still later day marriage was practiced by the secular clergy,[2] the priestly office in some instances practically becoming hereditary, passing on from father to son.[3] But in the western church asceticism at last gained a complete victory; and the priest taking orders after marriage was obliged to put away his wife; while in both East and West marriage after the taking of orders was for-

quence of this doctrine in the eighteenth century civil marriage arose in France: FRIEDBERG, *Geschichte der Civilehe*, 26–29; *idem*, *Eheschliessung*, 546 ff., 509 ff. *Cf.* SALIS, *Publikation des trid. Rechts*, 46 ff.; RIEDLER, *Bedingte Eheschliessung*, 12, 18 ff.; ESMEIN, *Le mariage en droit canonique*, I, 78 ff.; II, 159 ff. The modern Catholic church rejects the doctrine that there can be a distinction between the contract and sacrament, the parties being the ministers of the sacrament. Yet in effect a distinction is really made. The benediction, we are told, is not "necessary in order to the validity of the sacrament; but it is the presence of the parish priest, which is a necessary condition *sine quâ non* in order to the validity of the contract."—HUMPHREY, *Christian Marriage*, 70 ff., 73 ff.; OSWALD, *Die dogmat. Lehre von den heil. Sakramenten*, II, 501 ff. On this controversy see especially RICHTER, *Lehrbuch*, 1047–49; MEURER, "Die rechtl. Natur des trid. Matrimonialdecrets," *ZKR.*, XXII; and SCHULTE, "Die Statthaftigkeit der Civilehe nach kath. Grundsätzen," *ibid.*, XI, holding that the action of the Council of Trent regarding the marriage contract is not dogmatic in character, and that hence the state, without violating Catholic doctrine, may rightly institute a compulsory civil marriage form. Compare ROSKOVÁNY, *De matrimonio in ecc. cath.*, 35–42; PERRONE, *De matrimonio christ.*, I, 46–159.

[1] KEMBLE, *Saxons*, II, 434 ff., 454, 455; LINGARD, *Hist. Anglo-Saxon Church*, I, 156–62; II, 235 ff., 260 ff.; STUBBS, *Const. Hist.*, I, 224; THEINER, *Die Einführ. der erz. Ehelosigkeit*, I, 267–69.

[2] In 376 "a Gallic synod excommunicated those who should refuse the ministrations of a priest on the ground of his marriage," though this need not imply that the church resisted celibacy: KEMBLE, *Saxons*, II, 441. Married priests were still allowed in the western church in 961. "The priests were enjoyned not to marry without the leave of the Pope, on which account a great disturbance took place in the diocese of Teilaw, so that it was considered best to allow matrimony to the priests."—"Brut y Twigsog.," in HADDAN AND STUBBS, *Councils*, I, 286. For England there is abundant evidence of the marriage of priests, sometimes of bishops, even as late as the twelfth century: KEMBLE, *op. cit.*, II, 443 ff.; HADDAN AND STUBBS, *op. cit.*, III, 19 (temp. Gregory); II, 178 (Scotland); LEA, *Sacerdotal Celibacy*, 147, 159 ff., 197 (concubines), 271 ff.; THEINER, *op. cit.*, II, 183 ff.; LINGARD, *Hist. Anglo-Saxon Church*, I, 156–62; II, 235, who thinks at first the rule of celibacy was enforced; STUBBS, *Const. Hist.*, I, 223, 224, notes; ELLIS, *Int. to Domesday*, I, 342 (two examples, *an.* 1086); especially the excellent discussion of celibacy in England by MAKOWER, *Const. Hist. Eng. Church*, 212–24, where the sources are cited.

[3] STUBBS, *Const. Hist.*, I, 243, 244, notes; *Cod. Dipl.*, xxxiii, cxlvi, ccxv, lxxx, cxxvii, lxxxii, cxxiv, clxix; HADDAN AND STUBBS, *op. cit.*, II, 178 (Scotland); THEINER, *op. cit.*, I, 321–47.

bidden.[1] The causes of the low esteem in which marriage was held by the early Christian theologians have been well described by Meyrick. "For some time before the Christian era a change of sentiment as to the relative excellence of the married and single life had been growing up among a section of the Jews. The national feeling was strongly in favour of marriage, and a man who was unmarried or without children was looked upon as disgraced. But the spirit of asceticism, cherished by the Essenes, led to an admiration of celibacy, of which no traces are to be found in the Old Testament; so that, instead of a shame, it became an honour to be unmarried and childless. In the early church this spirit, at first exhibiting itself only to be condemned in the Encratites," and some other sects, "struggled with a healthier feeling, till at length it stifled the latter. But another cause was working in the same direction. The days of chivalry were not yet; and we cannot but notice, even in the greatest of the Christian fathers, a lamentably low estimate of woman, and consequently of the marriage relationship. Even St. Augustine can see no justification for marriage, except in a grave desire deliberately adopted of having children."[2] If "marriage is sought after for the

[1] After centuries of struggle and divergent practice, this was decreed by the Roman council under Nicholas II., 1059; and by the first Lateran council under Calixtus II., 1123: MEYRICK, in *Dict. Christ. Ant.*, II, 1100; *Hard. Concil.*, tom. vi, 1052; vii, 1111. "The eastern church has never forbidden marriage before ordination to its presbyters, and has never laid upon them the burden of abstinence from their wives; and there is no doubt that the eastern discipline in this respect was the discipline of the whole of the early church." But eventually, in the East as well as the West, bishops were forbidden to have wives: MEYRICK, *op. cit.*, 1098, 1099, where the sources are cited on the whole subject of the rise of celibacy. *Cf.* ZHISHMAN, *Das Eherecht der orient. Kirche*, 165 ff., 449 ff.; LYNDWOOD, *Provinciale* (ed. 1505), foll. xc–xcv; LINGARD, *Hist. Anglo-Saxon Church*, I, 156 ff.; KEMBLE, *Saxons*, II, 439 ff.; SCHULTE, *Der Cölibatszwang*, 5 ff.; *Recherches phil. et hist. sur le célibat*, 147 ff.; LEA, *Sacerdotal Celibacy*, 59 ff.; THWING, *The Family*, 74 ff.; GAGE, *Woman, Church, and State*, 49 ff., 55 ff.; NISBET, *Marriage and Heredity*, 44 ff.

[2] Citing AUGUSTINE, *Serm.* ix, li, *Op.*, tom. v, pp. 88, 345, ed. MIGNE. Augustine's view is that of the earlier Fathers; see the references in n. 2, p. 325, above, to which many more might be added. *Cf.* ESMEIN, *Le mariage en droit canonique*, I, 83–87; THEINER, *Die Einführung der erz. Ehelosigkeit*, I, 23 ff. (teachings of the "heretical sects"), 81 (teachings of the "Fathers"); *Recherches phil. et hist. sur le célibat*, 177 ff. (doctrines of the early "heretics").

sake of children, it is justifiable; if entered into as a *remedium* to avoid worse evils, it is pardonable; the idea of 'the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity,' hardly existed and could hardly yet exist.[1] In the decline of the Roman empire, woman was not a helpmeet for man, and few traces are to be found of those graceful conceptions which western imagination has grouped round wedded love and home affections. The result was that the gross, coarse, material, carnal side of marriage being alone apprehended, those who sought to lead a spiritual life, that is, above all, the clergy, instead of 'adorning and beautifying that holy estate' and lifting it up with themselves into a higher sphere and purer atmosphere, regarded it rather as a necessary evil to be shunned by those who aimed at a holier life than that of the majority."[2]

But, in spite of theology and priestly asceticism, there is little doubt that the loftier ideals and the gentler affections

[1] In the *Stromata*, c. xxiii: *Ante-Nicene Fathers*, II, 378, CLEMENT OF ALEXANDRIA approaches the loftier view of marriage. "Philosophers" are "to take advantage of marriage for help in the whole of life, and for the best self-restraint." It is a "sacred image;" and "every foul and polluting practice" must be purged away from it.

[2] MEYRICK, in *Dict. Christ. Ant.*, II, 1198. The early theological conception of marriage is much lower than that of the mature Roman law: "Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio": MODESTINUS, in *Digest*, xxiii, tit. 2, l. 1: *Corpus juris civilis*, I, 295. *Cf.* FREISEN, *Geschichte des can. Eherechts*, 22. As if to emphasize the paradoxical nature of the prevailing dogma, the Council of Trent anathematizes those who say "that matrimony is not truly and properly one of the seven sacraments;" as well as those who say "that the marriage state is to be placed above the state of virginity, or of celibacy, and that it is not better and more blessed to remain in virginity, or in celibacy, than to be united in matrimony."—WATERWORTH, *Canons and Decrees*, 194, 195. The Reformation Fathers constantly reproach their Roman antagonists with this anomaly and with having debased the state of marriage which is right for all according to the law of God and nature: see the Parker Society collection of the *Works of Fathers and Early Writers of the Reformed English Church*, General Index, at "Marriage," 515–17. *Cf.* the curious book of MADAN, *Thelyphthora, or a Treatise on Female Ruin* (2d ed., London, 1781), who endeavors to show that sacerdotal celibacy, the theory of impediments, and the invention of the sacrament of matrimony have lowered the ideal of marriage which is an institution divinely ordained for all men. He brings together in convenient form for reference a mass of extracts from the teachings of the Fathers, the papal and conciliar decrees, the utterances of the schoolmen, and other sources.

which we now associate with wedded life were beginning to make themselves felt in the early Christian family; just as despite the licentiousness found in the imperial and noble circles of the capital, most observed and doubtless exaggerated by historian and satirist, and notwithstanding the surviving coldness[1] of the patriarchal age, the same ideas and sentiments, independently of Christian influences, must already have been springing up among the common people of the provinces, and presently in the Stoic families of the Antonine era were to reach a splendid development worthy of the days in which we live.[2] It is doubtless true, as so often urged, that there is a bright side to the history of celibacy. Incidentally the monk organized schools, taught the barbarous tribes the dignity of labor, demonstrated the power of industry,[3] and handed down to the men of the Renaissance some of the materials of classic learning. So, likewise, the convent afforded an outlet for the energy and the ambition of woman. Here in a large measure she enjoyed independence and could assert her individuality. "For the convent accepted the dislike women felt to domestic subjection and countenanced them in their refusal to undertake the duties of married life." The "outward conditions of life were such that the woman who joined the convent made her decision once for all. But provided she agreed to forego the claims of family and sex, an honorable independence was secured to her, and she was brought into contact with the highest aims of her age. At a period when monasteries, placed in the remote and uncultivated districts, radiated peace and civilization throughout the neighborhood, many women devoted themselves to managing settlements which, in the standard they attained, vied in excellence with the settlements man-

[1] FARRAR, *Seekers after God*, 10 ff.

[2] CAPES, *Early Empire*, 223 ff., discusses the exaggeration of the satirists; and in his *Age of the Antonines*, 85, 86, 89, 90, 117 ff., he describes the family life of Marcus Aurelius and analyzes his meditations.

[3] TAINE, *Ancient Régime*, 1-5.

aged by men." "The career open to the inmates of convents both in England and on the continent," continues Eckenstein, in summarizing the results of her valuable researches, "was greater than any other ever thrown open to women in the course of modern European history."[1] Still, granting all that can be said for the conventual life, the motives which sustained it only throw into bolder relief the social evils of the age and the low ideal of marriage fostered by asceticism itself. History all too plainly shows that the benefits conferred by monasticism and the enforced celibacy of the secular clergy come far short of balancing the evils flowing from the conception of wedlock as a "remedy for concupiscence." The influence of the church did, indeed, tend to condemn the breach of conjugal fidelity by the husband as equally sinful with that of the wife; although this righteous principle has by no means always been observed in Christian legislation. On the other hand, celibacy bred a contempt for womanhood and assailed the integrity of the family.[2] The

[1] ECKENSTEIN, *Woman under Monasticism*, 5, 478. This important and very interesting book throws much new light on the position of woman in the Middle Ages. The convent was a refuge from the "tyranny" of the family; and the author believes that the desire for independence was a survival of the "mother-age." The woman saint is thus a successor of the "tribal goddess" and the "heathen prophetess."

[2] The doctrine that woman was the cause of the "original sin" arose among the early fathers of the church, and it was well established by the time of Augustine. At the Council of Macon (585) the question, "Does woman possess a soul?" was seriously discussed. "Upon one side it was argued that woman should not be called 'homo;' upon the opposite side that she should, because, *first*, the Scriptures declared that God created man, male and female; *second*, that Jesus Christ, son of a woman, is called the son of man. Christian women were therefore allowed to remain human beings in the eyes of the clergy, even though considered very weak and bad ones." —GAGE, *Woman, Church, and State*, 56.

Nevertheless for many this problem remained for centuries a topic for theological debate. In 1595 appeared ACIDALIUS'S *Disputatio nova contra mulieres, qua probatur eas homines non esse.* In the same year it was republished, with an answer, by SIMON GEDDICUS under the common title, *Disputatio perjucunda, qua anonymus probare nititur mulieres homines non esse: cui opposita est Simonis Geddici sacros. theologiae doctoris defensio sexus muliebris* (editio novissima, Hagae-Comitis, 1644). At the end Simon writes: "Scriptum Halae Saxonum, 10. Februarii, Anno Filii Dei nati, Hominis veri, ex Maria Virgine, homine vera, 1595."

Still later (1667) FEYERABEND, *De privilegiis mulierum* (3d ed., Jena, 1672), 2-5, starts with the inquiry, "an mulieres sint homines?"

gross immorality of the mediaeval clergy, regular and secular, and the shocking abuses of the confessional have often been recorded and fortunately need not here be dwelt upon.[1]

We may next consider the second member of the paradox, the dogma which constitutes the very basis of the canon law of marriage and the source of manifold hardships and confusion. By the second half of the twelfth century the doctrine that marriage is a sacrament was thoroughly established in the western church.[2] The early Christian teachers had, indeed, regarded it as one of the many holy "mysteries" to which the name "sacrament" was given.[3] But it was long before any of these were differentiated as distinct rites superior to the rest in religious efficacy. Not until 1164, in the fourth book of Peter Lombard's *Sentences*, do we find the first clear recognition of the "seven sacraments," among

[1] For details consult THEINER, *Die Einführung der erz. Ehelosigkeit*, I, 44 ff., 54–60, 167 ff., 239, 296, *passim;* II, 183–209; III, 96–148 (contemporary evidence for the period 1448 to the Reformation), 305 ff. (influence of the Jesuits on morals); LEA, *Sacerdotal Celibacy*, 78 ff., 109 ff., 115 ff., 129, 135 ff., 161–77, 330–61, 566–80 (abuse of the confessional, especially since the Council of Trent), 631 ff.; *idem*, *Hist. of Auricular Confession*, I, 378–400 (solicitations), 240 ff., 261, 272, 426 ff.; LECKY, *Hist. of European Morals*, II, 120 ff., 148 ff., 316–72; HUTH, *Marriage of Near Kin*, 108 ff.; the vigorous arraignment of the church and the canon law for their alleged degrading influence on woman by GAGE, *Woman, Church, and State*, 49 ff., 113 ff., 152 ff.; and *idem*, in *Hist. of Woman Suffrage*, I, 753–99. For the opposite view read *Christian Marriage*, by REV. WILLIAM HUMPHREY, S. J.; ZIMMERMANN, *Der Priester-Cölibat*, 11 ff.; GIDE, *La femme*, 169–82; and compare THWING, *The Family*, 45 ff.; *Letters on the Const. Celibacy of the Clergy*, 266 ff., 294 ff.; and BOUVET, *De la confession et du célibat des prêtres*, 195–238, containing extracts from BURCHARD'S *Decretorum*, showing the abominable questions put to women. For the literature relating to celibacy (to 1887) see especially ROSKOVÁNY'S *Coelibatus et breviarium* (13 vols., 1861–88), enumerating 6,785 books, essays, and articles on the subject, of which (according to THEINER, *op. cit.*, III, 379) 3,285 are antagonistic.

[2] Thoroughly to appreciate the nature of the controversy over the sacramental nature of marriage the writings of the Reformation Fathers should be studied. See General Index to the Parker Society publications; and *cf.* MADAN'S *Thelyphthora*, already mentioned.

[3] The early Fathers render the Greek μυστήριον by *sacramentum*, which is defined by St. Augustine as "the visible form of invisible grace," or "a sign of a sacred thing": *Encyc. Brit.*, XXI, 131. *Cf.* also FRIEDBERG, *Eheschliessung*, 153, 154; FREISEN, *Geschichte des can. Eherechts*, 29 ff.; ZHISHMAN, *Das Eherecht der orient. Kirche*, 124 ff.; OSWALD, *Die dogmat. Lehre von den heil. Sakramenten*, I, 25 ff.; PERRONE, *De mat. christ.*, I, 1–21; SCHULTE, *Lehrbuch*, 349; RICHTER, *Lehrbuch*, 1044, 1045; THWING, *The Family*, 81; and the monograph of BAIER, *Die Naturehe in ihrem Verhältniss zur christlich-sakramentalen Ehe;* AMAT, *Treatise on Matrimony*, 3 ff.

which that of marriage appears;[1] and these were approved by the Council of Florence in 1439 and later by the Council of Trent.[2] The theory of the sacramental character of wedlock had two consequences of vast importance for the history of matrimonial law. First is the dogma of the indissolubility of the marriage bond, involving the whole problem of separation and divorce, which must be reserved for discussion in another chapter;[3] and, second, the exclusive jurisdiction of the church in matrimonial causes.[4] This ecclesiastical function, like so many others, is of slow growth. "We are here confronted by a conception which certainly does not belong to the primitive sources. It is not by a revindication of principles that the church conquers jurisdiction in marriage. After having shared it with the state for centuries, she obtained it in the Middle Ages without partition;" and "when her competence was well established and a theory for it was required, it was justified by saying that the church alone could take cognizance of sacraments;" and "at the Council of Trent when this jurisdiction was solemnly affirmed in a canon sanctioned by anathema, the majority of the orators brought it expressly into connection with the sacrament."[5] In England between the seventh and the twelfth centuries the ecclesiastical authority in matrimonial questions was slowly established. Gregory writes to Augustine concerning forbidden degrees.[6] Later Theodore regulates marriage and divorce.[7] "When the conqueror had paid the

[1] See the incunabula edition of PETRUS LOMBARDUS, *Textus sententiarum* (1488). *Cf.* MADAN, *Thelyphthora*, III, 262; NISBET, *Marriage and Heredity*, 46; FREISEN, *Geschichte des can. Eherechts*, 34 ff.; OSWALD, *Die dogmat. Lehre von den heil. Sakramenten*, I, 29; II, 458 ff.; CIGOI, *Unauflösbarkeit*, 107 ff.; PERRONE, *De mat. christ.*, I, 22 ff.

[2] *Encyc. Brit.*, XXI, 132; WATERWORTH, *Canons and Decrees*, 193-96.

[3] See chap. xi, below.

[4] For the growth of ecclesiastical jurisdiction in the West see ESMEIN, *Le mariage en droit canonique*, I, chap. i.

[5] *Ibid.*, 73, 74, where the sources are cited; WATERWORTH, *Canons and Decrees*, 196.

[6] HADDAN AND STUBBS, *Councils*, III, 20.

[7] *Ibid.*, 199-202.

debt that he owed to Rome by a definite separation of the spiritual from the lay tribunals,[1] it cannot have remained long in doubt that the former would claim the whole province of marriage law as their own. In all probability this claim was not suddenly pressed; the *leges Henrici*[2] endeavor to state the old law about adultery; the man's fine goes to the king, the woman's to the bishop; but everywhere the church was beginning to urge that claim, and the canonists were constructing an elaborate jurisprudence of marriage. By the middle of the twelfth century, by the time when Gratian was compiling his concordance of discordant canons, it was law in England that marriage appertained to the spiritual forum."[3] From the time of Glanville the "marriage law of England was the canon law."[4]

The theories adopted and developed by the canonists favor the forming of marriages. "All those are urged to marry who are unable to bear the superior state of virginity or continence and who are not restrained by solemn vows." Consequently the canon law "renders the formation of marriage as easy as it had rendered its dissolution difficult."[5] At first, as already explained, it adopted the Roman betrothal, which possessed no legal significance, the marriage

[1] On the separation of the lay and spiritual jurisdictions see STUBBS, *Const. Hist.*, I, 300, 307; *idem*, *Select Charters*, 85; *idem*, *Lectures*, 300. SCHMID, *Gesetze*, 357, and THORPE, *Anc. Laws*, II, 213, give William's law, the date of which is unknown. See also MAKOWER, *Const. Hist. of English Church*, 465, 466, 392 ff.

[2] *Leges Henrici Primi*, 11, § 5.

[3] POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 365. The *Concordia discordantium canonum*, or Decree of Gratian, comprises the first volume of RICHTER AND FRIEDBERG'S fine edition of the *Corpus juris canonici* (Leipzig, 1879). The bringing together of the scattered rules of the ecclesiastical authorities by Ivo of Chartres in the reign of Henry I., and especially by Gratian (1151), was of vast importance in building up the ecclesiastical jurisdiction. On the history of the canon law see STUBBS, *Lectures*, 292–333; *idem*, *Const. Hist.*, I, 308 ff.; DODD, *Hist. Canon Law*, 150 ff., 161 ff.; BLACKSTONE, *Commentaries*, I, 14, 15, 19; ESMEIN, *Le mariage en droit canonique*, I, 3 ff., 56 ff., 108 ff. The best account of the rise and jurisdiction of ecclesiastical courts in England will be found in MAKOWER, *Const. Hist. of Eng. Church*, 384–464.

[4] POLLOCK AND MAITLAND, *op. cit.*, II, 365, 366; GEARY, *Marriage and Family Relations*, 1 ff.

[5] ESMEIN, *op. cit.*, I, 85.

beginning with the nuptials or actual living together. Later it accepted the principles of Germanic custom, according to which the legal effects of betrothal became far more stringent, and the marriage was perfected at the nuptials or tradition, and not through the *Beilager*, or physical union. Hence by the mediæval canon law, if the nuptials were solemnized by priestly benediction, though not followed by *copula* or physical union, a marriage was formed which could not be annulled by means of subsequent espousals thus consummated.[1] Gradually, however, as the betrothal gained, the nuptials lost, in importance. Before the middle of the twelfth century the doctrine prevailed that the *copula carnalis* is the supreme legal moment in marriage.[2] This theory, which had arisen with Hincmar of Rheims,[3] is especially associated with the name of Gratian, in whose *Decretum* the arguments for and against it are weighed, with the result of its practical acceptance, though he tries to reconcile it with the Roman view, that the nuptial *consensus* constitutes the marriage.[4] According to him, there are two degrees in marriage: one is the *conjugium initiatum*, arising in the simple consent of the espoused; second, the *conjugium ratum*, created by the *copula carnalis* and perfecting the former. The *conjugium initiatum* may be dissolved at pleasure; but the *conjugium ratum* is indissoluble. Thus the former is

[1] This is the view established by SOHM, *Eheschliessung*, particularly 120 n. 22, 151 n. 89. Compare SEHLING, *Unterscheidung der Verlöbnisse*, 1 ff., 14 ff., 34 ff.; SCHEURL, *Kirch. Eheschliessungsrecht*, 35 ff.

[2] SOHM, *op. cit.*, 150–52; *idem*, *Trauung und Verlobung*, 61 ff.; FRIEDBERG, *Eheschliessung*, 209; ESMEIN, *op. cit.*, I, 83. RIEDLER, *Bedingte Eheschliessung*, 15 ff., discusses the different views as to the relation of *consensus* and the *copula carnalis*, in connection with the sacramental nature of marriage. See also FREISEN, *Geschichte des can. Eherechts*, 151 ff., 164 ff., on the whole subject.

[3] SEHLING, *Unterscheidung der Verlöbnisse*, 33–59.

[4] GRATIAN, *Decreti sec. pars. causa* xxvii, quest. ii, c. 16 ff.: RICHTER AND FRIEDBERG, *Corpus juris canonici*, I, 1069 ff. *Cf.* ESMEIN, *op. cit.*, I, 97–119; SOHM, *Eheschliessung*, 111 ff.; FREISEN, *op. cit.*, 164 ff.; SCHEURL, *op. cit.*, 58–75; SEHLING, *op. cit.*, 81 ff.; HEUSLER, *Institutionen*, II, 290; DIECKHOFF, *Die kirch. Trauung*, 115 ff.

merely the Roman betrothal under another name. But the Bolognese jurists made it more stringent, assigning eight reasons for which alone such a marriage could be dissolved.[1]

The theory of the classic canon law, formulated by Gratian, that there is no marriage "until man and woman have been one flesh,"[2] does not receive so much emphasis in any other legal system.[3] It had far-reaching consequences in matrimonial jurisprudence.[4] Marriage became a simple consensual compact. "In strictness of law all that was essential was this physical union accompanied by the intent to be thenceforth husband and wife. All that preceded this could be no more than an espousal (*desponsatio*) and the relationship between the spouses was one which was dissoluble; in particular it was dissolved if either of them contracted a perfected marriage with a third person."[5]

But before the close of the twelfth century theological subtlety had conceived and gained the acceptance of a distinction in the forms of contract which was fatal to the security of the marriage bond. The famous classification of contracts as *sponsalia per verba de praesenti* and *sponsalia per verba de futuro*, though its principle was earlier asserted, is due mainly to Peter Lombard;[6] and through the

[1] On the whole subject see ESMEIN, *op. cit.*, I, 97–119.

[2] POLLOCK AND MAITLAND, *op. cit.*, II, 366.

[3] ESMEIN, *op. cit.*, I, 83. Esmein traces the origin of this doctrine of the canonists in part to the influence of the "popular" or "naturalistic" view of marriage; in part to certain texts of the Old and New Testament (particularly Gen. 2:23, 24; 1 Cor. 16:16): and in part to the conception of marriage as a remedy for concupiscence: *op. cit.*, 83, 84, 97 ff. *Cf.* POLLOCK AND MAITLAND, *op. cit.*, II, 367 n. 1; FREISEN, *op. cit.*, 173.

[4] It affected the "théorie de la formation et de la dissolution du mariage, théorie de la nullité pour cause d'impuissance, théorie de l'affinité, théorie des droits et des devoirs des époux."—ESMEIN *op. cit.*, I, 83.

[5] POLLOCK AND MAITLAND, *op. cit.*, II, 366.

[6] Peter Lombard (d. 1164) was a professor in the University of Paris, and later was ordained a bishop: *cf.* SOHM, *Eheschliessung*, 121 ff.; ESMEIN, *op. cit.*, I, 119 ff. His theory is set forth in the *Sententiae*, lib. iv, dist. 27, 28: "Efficiens autem causa matrimonii est consensus, non quilibet, sed per verba expressus: nec de futuro sed de praesenti. Si enim consentiunt in futurum, dicentes, Accipiam te in virum, et ego

influence of Alexander III. ("Magister Rolandus") it was accepted generally by the western church.[1] The theory of Lombard represents the triumph of Gallic theology over the doctrine of Gratian, as maintained by the Italian jurists; and, in effect, it is an attempt to combine the principles of the Roman with those of the German—that is to say, the canonical—betrothal.[2] In *sponsalia de praesenti*, in words of the present tense, the man and woman declare that they take each other now, from this moment onward, as husband and wife, Such a contract is a valid marriage, though not followed by actual wedded union; and since in theory it is a real marriage, it is necessarily sacramental in character. It creates a bond which can be dissolved only with the greatest difficulty. It constitutes "at all events an initiate marriage; the spouses are *coniuges;* the relationship between

te in uxorem, non est iste consensus efficax causa matrimonii": dist. 27, § 3. "Consensus, id est pactio conjugalis, matrimonium facit, et extunc est conjugium etiamsi non praecessit, vel secuta est copula carnalis": dist. 27, § 4. The *consensus*, if expressed by a verb of the present tense, *accipio te*, constitutes a valid marriage without *copula*. Opposed to this is a promise, expressed by a verb in the future tense, *accipiam te*, which is binding only when followed by *copula*. Compare TANCRED, *Summa de mat.*, 3 ff.; and see the masterly discussion of the history of the distinction, in SOHM, *op. cit.*, chap. iv, and his *Trauung und Verlobung*, 73–109. *Cf.* SCHEURL, *Kirch. Eheschliessungsrecht*, 76 ff.; DIECKHOFF, *Die kirchl. Trauung*, 115 ff.; SEHLING, *Unterscheidung der Verlöbnisse*, 72 ff., 115 ff.; FREISEN, *Geschichte des can. Eherechts*, 179 ff., 205 ff.; KENT, *Commentaries*, II, 87; BISHOP, *Marriage, Divorce, and Separation*, I, §§ 313 ff., 353 ff.; FRIEDBERG, *Eheschliessung*, 203, 206; STEPHENS, *Laws of the Clergy*, I, 672 ff.; especially POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 366 ff.; ESMEIN, *op. cit.*, I, 119–37; SALIS, *Die Publikation des trid. Rechts*, 2, 3.

[1] SOHM, *Eheschliessung*, 124 ff.

[2] This is proved by SOHM, *op. cit.*, chap. iv; *idem*, *Trauung und Verlobung*, chap. iii; and by ESMEIN, *op. cit.*, I, 119–37.

Magister Vacarius, who lived in England *ca.* 1148–98 and probably taught law at Oxford, has a theory differing from that of Gratian or Lombard. According to him, the "true act of marriage, the act which marks the moment at which the marriage takes place, is the mutual delivery (*traditio*) of man and woman each to each. Of course as a condition there must exist a pact of the appropriate kind. . . . . Again, as a condition there must be the natural power of effecting a carnal union; but the *carnalis copula* is unessential." The marriage is *made* by the tradition: MAITLAND, "Magistri Vacarii summa de matrimonio," *Law Quart. Rev.*, XIII, 136–38. In the same volume, 270–87, MAITLAND publishes the text of the Summa.

On the two kinds of canonical *sponsalia* see the dissertations described in Bibliographical Note VIII.

them is almost as indisseverable as if it had already become a consummate marriage. Not quite so indisseverable however; a spouse may free himself or herself from the unconsummated marriage by entering religion, and such a marriage is within the papal power of dispensation."[1] But even the unconsummate marriage *de praesenti* cannot be dissolved by a subsequent marriage which either party may contract, though followed by wedded union.[2] Espousals *de futuro*, on the other hand, are a promise for future joining in marriage. Physical union when preceded by such a contract is held to constitute a binding marriage. The canonists went farther than this, as Esmein declares, and "in a way set a snare for human nature to beguile the imprudent into the matrimonial state" through the theory of "presumptive marriage." The *copula carnalis* was made a legal ground for assuming the foregoing promise to wed. "The rule was laid down that it is always necessary to judge in favor of marriage unless the contrary be clearly understood."[3] Moreover, the church steadily refused to make the validity of marriage depend upon forms and conditions such as the civil law prescribes. There was no absolute requirement of parental consent[4] or

[1] POLLOCK AND MAITLAND, *op. cit.*, II, 366.

[2] This doctrine was already sanctioned by Innocent III. (1130–43): ESMEIN, *op. cit.*, I, 126.

[3] ESMEIN, *op. cit.*, I, 85. *Cf.* POLLOCK AND MAITLAND, *op. cit.*, II, 366.

[4] The effect of this neglect on clandestine marriage is forcibly described by LUTHER, *Tischreden*, foll. 355, 356. "Dass aber die Juristen fürgeben und anziehen den Canon, und sagen: Dass der Eltern Autoritet, Rath, und Will wol Ehren halben möge dabey sein, aber nicht auss not, dass es also sein müsste, denn die Bewilligung derer, die mit einander wollen Ehelich werden, ist die Substantz, die nötig ist. Der Eltern will aber ist ein *accidens*, ein zufellig ding, das nur Erbarkeit und Ehrenhalben geschieht, macht aber noch hindert nicht die Ehe.

"Es ist ein Gottloser Canon, und der Canonisten wahn wider Gott, gleich als ein Buler, der in der ersten Brunst und unsinnigkeit daher gehet, nicht viel nach Erbarkeit fragt. Also gehet der Eltern autoritet, ansehen, gewalt, und gehorsam zu Boden."

On the marriage of minors see SELDEN, *Uxor ebraica*, 99–104; *Opera*, III, 605–8; MORGAN, *Marriage, Adultery, and Divorce*, I, 283 ff.; LAUGINGER, *De consensu parentum*, quaest. viii ff.; LOHEN, *De parentum ad nuptias a liberis contrahendas consensu* (Regiomonti, 1685).

of a certain age. All persons on reaching the years of puberty were declared capable of wedlock solely on their own authority. No religious ceremony, no record, or witness was essential. The private, even secret, agreement of the betrothed, however expressed, was declared sufficient for a valid contract.[1] All these things might be enjoined under sanction of severe discipline for their neglect; but the marriage, if formed without them, was not the less binding. A puzzling and disastrous antagonism between *legality* and *validity* was thus created. Even the Council of Trent, while making the validity of the marriage depend upon its conclusion in the presence of a priest and two or three witnesses, declined to go farther and give an equal sanction to banns, registration, or the benediction, though these were enjoined in its decree. After the council as well as before children barely arrived at the age of puberty might contract a valid marriage without the consent, or even against the will, of their parents.[2] In short, as Esmein has so well shown, lest without a safety-valve the temptations of the flesh should become too strong for weak human nature, and lest access to a sacrament should be hindered, it was deemed necessary to discard all restraints originating in mere "human convention."[3] It is a noteworthy fact that the dogma of marriage as a sacrament came near being a fatal obstacle in the way of the action of the Council of Trent against secret marriages.[4] For how could the church legislate concerning a holy mystery

[1] On the lack of prescribed conditions see ESMEIN, *op. cit.*, I, 149 ff.; FREISEN, *Geschichte des can. Eherechts*, 307-29.

[2] SALIS, *Die Publikation des trid. Rechts*, 14, 15, 31 ff.; FRIEDBERG, *Eheschliessung*, 103, 122, 123; FLEINER, *Die trid. Ehevorschrift*, 3; WATERWORTH, *Canons and Decrees*, 196 ff., CCXXVI ff.

[3] ESMEIN, *op. cit.*, I, 85, 86; POLLOCK AND MAITLAND, *op. cit.*, II, 367-72; SALIS, *op. cit.*, 3, 4.

[4] *Ibid.*, 44-47, notes, where the evidence is collected from the sources. *Cf.* also RIEDLER, *Bedingte Eheschliessung*, 12, 18 ff.; ESMEIN, *op. cit.*, I, 78 ff.; II, 159 ff.; FRIEDBERG, *op. cit.*, 109; WATERWORTH, *op. cit.*, pp. CCXXV ff., 193-96.

which Christ himself had given her, without suggesting the human nature of the matrimonial contract and by implication admitting the right of the state to exercise a similar control? But even in this domain her exclusive jurisdiction was affirmed.

II. CLANDESTINE MARRIAGES THE FRUIT OF THE CANONICAL THEORY

The way was thus cleared for clandestine marriages. All efficient restraints upon hasty unions were rejected; and often it became impossible for the courts or even the parties themselves to know whether a man and a woman were legally husband and wife or their children legitimate. Seldom have mere theory and subtle quibbling had more disastrous consequences in practical life than in the case of the distinction between *sponsalia de praesenti* and *de futuro*. The difference was not essential, but purely verbal.[1] The canonist had before his mind the tense inflections of a Latin verb. He insisted on a distinction which found no place in popular ideas and which the usages of popular speech refused to observe. In the English as well as the German idiom the contrast between the present and the future tense is not always

[1] SOHM, *Eheschliessung*, 133 ff.; *idem*, *Trauung und Verlobung*, 1 ff., has demonstrated that in their "content" the two kinds of *sponsalia* are identical; the one is no more nor no less a betrothal than the other, each looking to a subsequent perfected marriage. The distinction is not "eine Unterscheidung verschiedener Thatbestände, sondern nur eine verschiedene rechtliche Behandlung desselben Thatbestandes."—*Eheschliessung*, 137. The differences in tense were arbitrarily made to have different legal consequences.

On the controversy as to the legal significance of the two kinds of *sponsalia* with Sohm compare SCHEURL, *Kirch. Eheschliessungsrecht*, 76–107; *idem*, "Zur Geschichte des kirch. Eheschliessungsrechts," *ZKR.*, XV, 65–92, who agrees with Sohm that both species of *sponsalia* are forms of betrothal (*Verlobungen*), but insists that they have different legal consequences. This article is criticised by BIERLING, "Kleine Beiträge," *ZKR.*, XVI, 288–316; who is answered by SCHEURL, "Consensus facit nuptias," *ibid.*, XXII, 269–86. See also DIECKHOFF, *Die kirch. Trauung*, 115 ff.; SEHLING, *Unterscheidung der Verlöbnisse*, 40 ff., 60 ff., 72 ff.; LYNDWOOD, *Provinciale* (Oxford, 1679), lib. quart., tit. 1, 270, 271; SANCHEZ, *Disputat. de sto mat. sac.*, I, 3–220; SELDEN, *Uxor ebraica* (ed., 1673), 92 ff., or *Opera*, III, 599 ff.

sharply defined.[1] This anomaly is described by Martin Luther in his usual trenchant style. "They have played a regular fool's game," he says, "with their *verbis de praesenti vel futuro*. With it they have torn apart many marriages which were valid according to their own law, and those which were not valid they have bound up. . . . . Indeed I should not myself know how a churl . . . . would or could betroth himself *de futuro* in the German tongue; for the way one betroths himself means *per verba de praesenti*, and surely a clown knows nothing of such nimble grammar as the difference between *accipio* and *accipiam;* therefore he proceeds according to our way of speech and says: 'I will have thee,' 'I will take thee,' 'thou shalt be mine.' Thereupon 'yes' is said at once without more ado."[2]

That German rustics were not the only lovers caught in the meshes of grammatical forms appears from the following passage written toward the close of the Tudor period by Swinburne, who nevertheless defends the canonical distinction, whether the contract be made in the Latin or in the vulgar tongue.[3] After refuting, as he believes, the reasoning of those who hold that the forms "I will take thee to my

[1] "Es kam hinzu, das der Gegensatz der Zeitform in der deutschen Sprache regelmässig überhaupt unerkennbar war, denn zu deutsch heisst es nicht: 'ich nehme dich,' noch: 'ich werde dich nehmen,' sondern 'ich will dich nehmen.'"—SOHM, *Eheschliessung*, 135.

[2] "Ja, ich wüsste selbs nicht wol, wie ein Knecht oder Magd sollten oder kunnten in deutscher Sprache *per verba de futuro* sich veloben; denn wie man sich verlobet, so laut's *per verba de praesenti*, und sonderliche weiss der Posel von solcher behender Grammatica nichts, dass *accipio* und *accipiam* zweierlei sei; er führet daher nach unserer Sprachen Art und spricht: 'Ich will Dich haben,' 'ich will Dich nehmen,' 'Du sollt mein sein,' etc. Da ist die Stunde ja gesagt ohn weiter Aufzug oder Bedenken."—LUTHER, "Von Ehesachen," *Werke* (Erlangen ed.), XXIII, 102, 103; also in *Bücher und Schriften* (Jena, 1561), V, 240, 241; and in STRAMPFF, 318, 319. This whole interesting passage, of which a portion is translated in the text, is given by SOHM, *Eheschliessung*, 139; and by FRIEDBERG, *Eheschliessung*, 206, 207. *Cf.* also LUTHER'S *Tischreden* (Frankfort ed., 1571), c. 36, p. 356. Luther's view is accepted by SCHEURL, *Das gemeine deutsch. Eherecht*, 64; and SALIS, *Die Publikation des trid. Rechts*, 3.

[3] SWINBURNE, *Of Spousals*, 55-73, gives a most interesting discussion of the verbal difficulties arising in *sponsalia de praesenti vel futuro*, comparing the legal writers for and against the distinction.

wife" ("*Ego volo te accipere in uxorem*") and "I do take thee to my wife" ("*Ego accipio te in uxorem*") are equally a contract in the present tense, he proceeds to attack the argument "drawn from the Simplicity of the Vulgar sort, who albeit they intend to tye such a Knot as can never be loosed, and make the Contract so sure as it may never be dissolved; yet such is their unskilfulness and ignorance herein, that they cannot frame their words to their minds, nor know whether it be all one to say 'I will take thee to my wife' or 'I do take thee to my wife,' much less do they know the difference betwixt these words, 'I will marry thee' and 'I will have thee to my wife,' or betwixt these words, 'I will take thee to my wife' and 'I will hold thee for my wife,' or betwixt these words, 'I will espouse thee' and 'I will intreat thee as my wife,' or betwixt these words, 'I will Contract Matrimony with thee' and 'I will provide for thee as my Wife,' or betwixt these words, 'I will make thee my wife' and 'thou shalt be my Wife,' with an hundred such differences wherein appeareth no dissimilitude. And therefore, since it is the very Consent of Mind only which maketh Matrimony, we are to regard not their Words, but their Intents, not the formality of the Phrase, but the drift of their Determination, not the outward sound of their Lips, which cannot speak more cunningly, but the inward Harmony or Agreement of their Hearts, which mean uprightly." Otherwise, especially in case of people of the "ruder sort, whose Sayings are to be expounded with all favour to the furtherance of Matrimony," if "we shall curiously descant upon every word proceeding from a simple Conceit, we cannot but miss of their meanings, and with our fine and dainty Distinctions (which never came within the compass of their gross Understandings) incumber the Consciences of them which be coupled. . . . . Lest therefore any Man's Conscience (through ignorance of Terms) might be intangled in the Snares of this subtle

and more captious Distinction of 'I will' and 'I do' with the rest of the Differences more subtle and more captious, ... are the same to be rejected, and this reasonable and conscionable Conclusion received . . . . where two intend to Contract Spousals *de praesenti*, there is Matrimony always contracted, although the words import but future Consent only."[1] Time has approved the soundness of this plea, in spite of the remonstrance of Swinburne and the logic of the worthy doctors whom he cites.

Scholastic hairsplitting had set a veritable trap for the feet of the unwary. "Of all people in the world lovers are the least likely to distinguish precisely between the present and the future tenses. In the Middle Ages marriages, or what looked like marriages, were exceedingly insecure. The union which had existed for many years between man and woman might with fatal ease be proved adulterous, and there would be hard swearing on both sides about 'I will' and 'I do.'"[2] Accordingly the ecclesiastical courts were given a dangerous power[3]—a perilous discretion in matrimonial causes, which, however wisely exercised, was sure to work much hardship and injustice. Since in substance espousals *de praesenti* and *de futuro* were identical, differing only in the consequences which the law attached to the tense form, it was inevitable that decisions should be arbitrary and waver-

[1] *Ibid.*, 62 ff. *Cf.* JEAFFRESON, *Brides and Bridals*, I, 114 ff., 124-37 (on "Pre-Contracts" before and after the Reformation).

[2] POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 367.

The rule laid down by Anselm in 1102, already mentioned, really invites such "hard swearing": "Promises of marriage made between man and woman without witnesses" are to be "null if either party deny them."—JOHNSON'S *Canons*, II, 27. The following is an example of what repeatedly happened in the ecclesiastical courts: "*Omnium Sanctorum Honylane.*—Thomas Potynger comparuit coram comissario [of London] in domo officii xxii die Augusti [1481], et prestitit juramentum, quod nunquam contraxhit matrimonialiter cum Margareta Hudson de eadem, ibidem presente, et confitente, quod nullum testem habuit ad probandum contractum, et ideo commissarius remisit eos regulae conscientiarum suarum."—HALE, *Precedents and Procds. in Crim. Causes*, 5. For another example see *ibid.*, 6.

[3] They obtained a *Freibrief*, or license, for their practice: SOHM, *Eheschliessung*, 138. *Cf.* FRIEDBERG, *Eheschliessung*, 16 ff., on the abuses of matrimonial jurisdiction.

ing; and, as a matter of fact, practically the same form of contract was held at one time to constitute *sponsalia de praesenti;* at another, a promise *de futuro;*[1] and the *Liber officialis* of St. Andrews, Scotland, contains the record of a divorce granted from a second union because the man had already contracted a previous marriage in these words: "I promyth to yow Begis Abirnethy that I sall mary yow, and that I sall neuere haiff ane uther wiff and therto I giff yow my fayth." It is a striking illustration of the entanglements resulting from the canonical theory that this contract is styled in the record "*both sponsalia de futuro* and *praesenti.*"[2] The worst of it was that the spiritual salvation or damnation of the man and woman, the genuineness of whose union was in question, depended upon the decision. The valid marriage was no less a sacrament, though dissolved through ignorance, error, or perjury; and the invalid marriage was no more a sacrament, though in the same way declared binding. For by a rule of the spiritual courts, in a suit growing out of a secret marriage, the plaintiff who affirmed the validity of the espousals, if the fact were denied by the defendant, had to prove his allegation. If he failed to do so— and this might easily happen, since often the espousals were formless and absolutely without witness[3]—the case was dismissed, the contract dissolved,

[1] "The promise, se ducturum in conjugem, or one similar, is conceived to be consensus de futuro in c. 5, 15, 17, 22x. de sponsal. (4, 1); but as consensus de praesenti in c. 5x. de sponsa duor. (4, 3)."—SOHM, *Eheschliessung*, 135 n. 51.

[2] Ex et pro eo quia dictus David diu ante solemnizationem dicti pretensi matrimonii . . . . alia sponsalia tam verba de futuro quam de praesenti cum Margareta Abirnethy, impressentiarum superstite, carnali copula subsecuta, contraxit," etc.— FRIEDBERG, *Eheschliessung*, 58; *Liber officialis S. Andree*, 21. This book, 19, 33, 66, 73, 75, contains, according to Friedberg, other records of marriages *de futuro*, sometimes *copula subsecuta*, dissolved on account of later *sponsalia de praesenti. Cf.* also SOHM, *op. cit.*, 135.

[3] In the spiritual courts two good witnesses were required to establish a fact. On the "proof of marriage" see ESMEIN, *Le mariage en droit canonique*, I, 189 ff.; II, 127 ff.; POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 382 ff.; *Law Review* (English), I, 378 ff.

and the parties were free to form new marriages elsewhere. But if the secret marriage were after all really valid, and therefore a sacrament, though not sustained for lack of proof, the husband and wife were still bound in their consciences; and if either should form a second union with another person, though it were publicly solemnized in face of the church, he would be guilty of the sin of bigamy.[1] To the existence of this cruel embarrassment Luther bears witness in a characteristic passage of his *Tischreden*.[2] "Now the pope and the jurists say that marriage may never be dissolved. What happens? The wedded people fall out and separate. So they come to me in the cloister or wherever an official can be found and swear themselves apart; then they marry again. Thereafter they come to me or to some confessor and say: Dear sir, I have now a wife whom I espoused secretly. What am I to do about it? Help me, dear Doctor, lest I despair. For Greta whom I first married is my proper wife. But this Barbara whom I espoused later is not my wife, and yet must I not sleep with her? The former I dare not take, though I should like to have her if I could; but I cannot for I have another wife and she likewise has another husband; yet no one knows that she is

[1] SALIS, *Die Publikation des trid. Rechts*, 6, 7; POLLOCK AND MAITLAND, *op. cit.*, II, 382, 383; ESMEIN, *op. cit.*, I, 189 ff.; II, 127 ff.; FRIEDBERG, *Eheschliessung*, 102 ff.; SOHM, *Eheschliessung*, 187 ff.

[2] Da spricht der Papst und die Juristen, die Ehe dürfe nimmermehr gescheiden werden. Was geschah? Die Eheleute wurden darnach uneins und schieden sich wieder von einander. Also ging mirs im Kloster auch; oder wo man fur den Official kam, so schwur sich eines vom andern, freieten wieder. Darnach kamen sie zu mir oder einem Andern in die Beichte und sprachen: Lieber Herr, ich habe itzt eine Frau, der hab ichs heimlich gelobt; wie thue ich ihm immermehr? Helft mir, lieber Herr Doctor, dass ich nicht verzweifele. Denn Greta, mit der ich mich am ersten verlob hab, ist mein recht Eheweib. Aber diese Barbara, die mir darnach vertrawet, ist nicht mein Weib und muss doch bei ihr schlaffen? Jene darf ich nicht nehmen, die ich doch gerne möcht haben, da es sein könnte; aber ich kann nu nicht, denn ich habe eine Andere, so hat sie auch einen Andern: doch weiss es Niemand, dass sie mein Weib ist, denn allein, Gott im Himmel, dem ist bewust. O, ich werde verdampt, ich weiss keinen Rath."—"Tischreden," in *Werke* (Erlang. ed.), LXII, 229; quoted also in SALIS, 7, 8, who gives other proofs; likewise in SOHM, *op. cit.*, 189, 190; FRIEDBERG, *op. cit.*, 102; and ESMEIN, *op. cit.*, II, 129.

my wife except God in heaven. O, I shall be damned, I know not what to do!"[1] Luther's testimony is fully sustained by similar evidence afforded by the proceedings and decrees of the Council of Trent.[2]

The evil of clandestine marriages prevailed generally throughout Christendom.[3] The provincial church councils as well as the temporal powers, local and national, were kept busy in devising penalties or other restraints in the vain hope of putting a stop to it. Such was the case in Holland, where, in spite of the decrees of the church and the statutes of the state, secret marriages, without the presence of witness, magistrate, or priest, were common.[4] The same is true of Portugal;[5] and Pope Alexander III. confesses that they were frequent in Italy, at least in the bishopric of Salerno, and they gave rise to vexatious litigation.[6] Suits were sometimes brought to enforce an alleged secret marriage for impure purposes. So severe were the provisions of Swiss legislation to check this evil, toward the close of the Middle

[1] In LUTHER'S "Von Ehesachen," *Werke* (Erlang., XXIII, 98), is another interesting passage forcibly describing the danger of bigamy through the confusion wrought by clandestine marriages. The passage is also in STRAMPFF, *Luther: Ueber die Ehe*, 313 ff.; and it is partly quoted by SOHM, *op. cit.*, 188, 189.

[2] RICHTER-SCHULTE, *Canones et dec. conc. trid.*, 216 ff.; PALLAVICINO, *Ist. conc. Trent.*, IV, lib. XXII, 1, 16; THEINER, *Acta gen. conc. trid.*, II, 314, 335. Cap. 1 of the decree of the council for the reform of marriage contains the following: "Cum sancta synodus animadvertat prohibitiones illas propter hominum inoboedientiam jam non prodesse, et gravia peccata perpendat, quae ex eisdem clandestinis conjugiis ortum habent, praesertim vero eorum qui in statu damnationis permanent, dum priore uxore cum qua clam contraxerant, relicta cum alia palam contrahunt et cum ea in perpetuo adulterio vivunt, cui malo cum ab ecclesia, quae de occultis non judicat, succurri non possit, nisi efficacius aliquod remedeium adhibeatur;" also in WATERWORTH'S *Canons and Decrees*, 196, 197. Compare the passage on the evil resulting from the canon law of marriage in the address with which Hieronymus Ragazzoni opens the last or XXV. solemn session of the council: THEINER, *Acta gen.*, II, 502. See this and other excerpts in SALIS, *op. cit.*, 1, 9, *passim*.

[3] In general see FRIEDBERG, Index, at "Ehe, heimliche;" SALIS, *op. cit.*, 1-14; SOHM, *op. cit.*, 187 ff., 132 ff.; ESMEIN, *op. cit.*, II, 121 ff.; I, 189 ff.; GEARY, *Marriage and Family Relations*, 434 ff., Index; POLLOCK AND MAITLAND, *op. cit.*, II, 367 ff., 382; SCHELHAS, *De clandestinis sponsalibus juratis* (Jena, 1716); LYNDWOOD, *Provinciale* (Oxford, 1679), 273 ff.; SANCHEZ, *Disputat. de sto mat. sac.*, I, 221-358. LUTHER'S "Von Ehesachen," *Bücher und Schriften*, V, 237-57, is largely devoted to a discussion of secret betrothals.

[4] FRIEDBERG, *op. cit.*, 66-69.

[5] *Ibid.*, 75.

[6] SALIS, *op. cit.*, 8; FRIEDBERG, *op. cit.*, 75-77.

Ages, that even the innocent were deterred from appealing to the courts to enforce their matrimonial rights. Before bringing suit security was required; and the unsuccessful plaintiff was fined and compelled to pay damage.[1] "Against a Zürich law of this kind an official of Konstanz remonstrates, declaring that 'without doubt there are in the bishoprick of Konstanz hundreds of persons who before the Lord God are married people, legally joined together, and yet who are so much in dread of the penalty as not to dare to enforce their legal rights against one another.'"[2] At the Council of Trent report was made of secret marriages in Africa[3] and the West Indies;[4] while in Germany they gave trouble both to the temporal and spiritual law-maker long after the Reformation.[5] The uncertainty and complexity of matrimonial law bore their natural fruit in Spain[6] and in France.[7] It was the king of France who through his *oratores*, or representatives, brought before the Council of Trent the proposal which prevailed to reform the abuse by making the validity of marriage depend upon its public solemnization;[8] while a measure of Alfonso the Wise of Castile, in 1258, not only defines the well-known three kinds of clandestine marriages, but shows clearly, what Gratian[9] had

[1] SALIS, *op. cit.*, 8, 9; *ap. Zeitschrift für schweiz. Recht*, 1878, XX, 114 ff.

[2] "Und ist ungezwyfelt, es sitzen im Bisthum Costanntz hundert und aber hundert parthyen, die vor Gott dem Herrn Eelüt sin und mit recht zusammen gewyst wurden, und doch umb sorg des penfals einander mit gepürlichen Rechten nit thüren fürnemmen."—SALIS, *op. cit.*, 9.

[3] See the letter of Mutio Calini to Cardinal Luigi Cornara, July 29, 1563, in SALIS, *op. cit.*, 13.

[4] THEINER, *Acta gen.*, II, 367, 513; PALLAVICINO, *Ist. conc. trid.*, Vol. IV, lib. xxii, 4, 24; SALIS, *op. cit.*, 12.

[5] FRIEDBERG, *Eheschliessung*, 79, 260, 261. [6] *Ibid.*, 71–74; SALIS, *op. cit.*, 11, 12.

[7] FRIEDBERG, *op. cit.*, 62 ff., 499; SALIS, *op. cit.*, 9, 11, 12.

[8] THEINER, *op. cit.*, II, 316; SALIS, *op. cit.*, 9; FRIEDBERG, *op. cit.*, 110.

[9] "Coniugia, que (quae) clam contrahuntur, non negantur esse coniugia, nec iubentur dissolui, si utriusque confessione probari poterunt: uerumtamen prohibentur, quia mutata alterius eorum uoluntate, alterius professione fides iudici fieri non potest. Unde publice, cum alterius uota in alteram partem se transtulerint, pro priore coniugio, quod iudici incertum est, sentencia ferri non poterit."—GRATIAN, *Decreti sec. pars causa* XXX, quest. v, c. ix: RICHTER-FRIEDBERG, *Corpus juris can.*, I, 1107. The passage is also quoted from different text by SALIS, *op. cit.*, 6,

already pointed out, that the permanence or dissolution of such a marriage really depends upon the will of the parties themselves, or even one of them. "Three kinds of marriage are called 'secret;' the first is one concluded privately and without witnesses, so that it cannot be proved. The second is one formed before witnesses, but without the consent of the bride's father, or mother, or other relative in whose protection she is, and without payment of the arrha or observing the other forms (honors) which holy church demands. The third is one whose banns have not been published in the parish where the parties live. . . . . The reason why the holy church forbids secret marriages is this: When a difference arises between the wedded pair, and the one will no longer live with the other, the church has no means to prevent the separation, even when in truth a marriage exists; because it cannot be proved. For the church cannot pass judgment on secrets; but only on the allegations of the parties which are proved."[1]

Nowhere perhaps is the history of secret marriages so interesting as in Scotland[2] and mediæval England. Many proofs and illustrations from literature, early rituals, lawbooks, and judicial decisions have been collected by Friedberg.[3] Usually the nuptials were celebrated in presence of

who adds the statement of the cardinal of Lothringen at the Council of Trent: "Clandestinum matrimonium est causa disjunctionis conjugum; tales enim cum nullos habeant testes matrimonii contracti, *pro libito* possunt separari."—*Ap.* THEINER, *op. cit.*, II, 314.

[1] The document, of which a part is translated in the text, will be found in FRIEDBERG, *op. cit.*, 72, 73. On the kinds of clandestine marriage see SALIS, *op. cit.*, 5, 6; BOHN, *Pol. Cyc.*, III, 320; ESMEIN, *Le mariage en droit canonique*, I, 181 ff.; LYNDWOOD, *Provinciale*, 276.

[2] For Scotland see GEARY, *Marriage and Family Relations*, 534 ff.; FRIEDBERG, *op. cit.*, 57, 58, *passim*; JEAFFRESON, *Brides and Bridals*, II, 259, 260.

[3] FRIEDBERG, *op. cit.*, 36-57, 317, 335, 344, 355. Secret marriages are censured by CRANMER, *Misc. Writings*, 82, 159; HOOPER, *Later Writings*, 137, 149; LATIMER, *Sermons*, II, 243. Consent of parents is urged by SANDYS, *Sermons*, 50, 281, 325, 326, 455; BECON, *Catechism*, 355, 358, 371, 372; *idem*, *Prayers*, 199, 532; TYNDALE, *Early Writings*, 169, 170, 199; JEAFFRESON, *Brides and Bridals*, II, 104-14; I, 113 ff., discusses clandestine marriages, mainly after the Reformation.

a priest at the church door according to popular forms, or, in the later period, according to more elaborate religious rites. But by custom the simple hand-fasting, with or without giving to the bride a penny or piece of gold, sufficed; and the hand-fasting is found also in connection with the ecclesiastical ceremony. Even in the case of secret marriages "it is characteristic that mention is almost always made of the presence of a priest who confers his blessing."[1] Miles Coverdale's translation of Bullinger's *Christen State of Matrimonye* (*ca.* 1541) contains the following instructive passage:

"Yet in thys thynge also must I warne everye reasonable & honest parson to beware, that in contractyng of maryage they dyssemble not, nor set forthe any lye. Every man lykewyse must esteme the parson to whom he is hand-fasted, none otherwyse than for his owne spouse, though as yet it be not done in the church nor in the streate. After the hand fasting & makyng of the contracte, the church goyng & weddyng shulde not be deffered to long, lest the wicked sowe hys vngracious sede in the mene season. Likewise the wedding (& cohabitaciō of the parties) ought to be begoñe with god, & with the ernest prayer of the whole church or congregaciō . . . . In to this dishe hath the devill put his foote, & myngled it with many wicked vses & customes. For in some places ther is such a maner, wel worthy to be rebuked that at the hand fastynge there is made a great feast & superfluous bancket, & even the same night are the two hād fasted persones brought & layed together, yea certayne wekes afore they go tot [sic] the church."[2]

[1] FRIEDBERG, *op. cit.*, 39, 40. This appears plainly from the constitution of Stratford, 1343, against clandestine marriages; as well as from that of Zouche, 1347: JOHNSON'S *Canons*, II, 395–97, 410, 411.

[2] MILES COVERDALE, *The Christen State of Matrimonye* (1st ed., 1541), xlviii, xlviiii.

This passage was transcribed for me from a copy of the first edition (1541) in the library of the British Museum by Professor William H. Hudson. To his kindness I

Eleven years earlier similar testimony is given in Richard Whitforde's *Werke for housholders*. "The ghostly ennemy," he says, "doth deceyue many psones by y^e^ pretence & colour of matrymony in pryuate & secrete contractes. For many men whan they can not obteyn theyr vnclene desyre of the woman wyl promyse marryage, & thervpon make a contracte promyse, & gyue fayth & trouth eche vnto other sayenge. Here I take the Margery vnto my wyfe, I therto plyght the my trouth. And she agayne, vnto hym in lyke maner. And after that done, they suppose they maye lawfully vse theyr vnclene behauyour, and somtyme the acte and dede doth folow, vnto the great offence of god & theyr owne soules. It is a great ieopardy therfore to make ony suche contractes, specyally amonge them selfe secretely alone, without recordes, whiche must be two at the least."[1]

In Scudmore's *A Woman's a Weathercocke* the priest who is expected to solemnize the marriage of a lady with Count Frederick says:

> "She is contracted, sir, nay married,
> Unto another man, though it want forme:
> And such strange passages and mutuall vowes,
> I would make your short haire start, through youre blacke
> Cap, should you heare it."[2]

Many similar proofs may be found in the plays and ballads of the sixteenth and seventeenth centuries.

am also indebted for the extract from Whitforde's book taken from a copy in the possession of the same library. In 1899 Sotheran offered for £4 10s. a "probably unique" copy of a 24mo edition of Coverdale's work, 1543. This he regards as a copy of the second edition, the title differing somewhat from that of the first edition. An 8vo edition appeared also in 1543, with a preface by Becon. FRIEDBERG, *op. cit.*, 40, quotes the same passage; but the different spelling indicates that he has not used the first edition.

[1] RICHARD WHITFORDE, *A Werke for housholders* (2d ed., 1537), sign. E. iii and following page. There is no pagination. For the date see BAYNE, in *Dict. Nat. Biog.*, LXI, 125-27.

[2] FRIEDBERG, *op. cit.*, 41.

III. THE EVILS OF THE SPIRITUAL JURISDICTION

The separation of the temporal and spiritual courts and the tenacity with which early custom and theory were preserved in the common law[1] render the history of matrimonial judicature anomalous in England. The leading case occurs in the reign of Stephen. "Richard de Anesty's memorable law-suit[2] was the outcome of a divorce pronounced in 1143 under the authority of a papal rescript, and one that to all appearance illustrated what was to be a characteristic doctrine of the canon law: a marriage solemnly celebrated in church, a marriage of which a child had been born, was set aside as null in favour of an earlier marriage constituted by a mere exchange of consenting words."[3] By the time of Henry II. this doctrine was completely established in England, as shown by the famous decretal epistle of Alexander III. to the bishop of Norwich: "A strong case is put. On the one hand stands the bare consent *per verba de praesenti*, unhallowed and unconsummated, on the other a solemn and a consummated union. The latter must yield to the former."[4] Such remained the law of England until the passage of the Hardwicke act in 1753.[5]

The perils arising in the canonical theory of espousals were greatly increased by the doctrine of impediments to marriage, particularly those growing out of forbidden degrees

[1] *Ibid.*, 47, 48.

[2] Discussed in PALGRAVE, *Commonwealth*, II, v-xxvii; BIGELOW, *Placita Anglo-Normannica*, 175; POLLOCK AND MAITLAND, *Hist. of Eng. Law*, I, 137, 138.

[3] *Ibid.*, II, 365.

For further illustration see LOERSCH, "Ein eherechtliches Urtheil," *ZKR.*, XV, 407-10; and FRENSDORFF, "Ein Urtheilsbuch des geist. Gerichts zu Augsburg," *ibid.*, X, 1-37, publishing a manuscript containing decisions for the years 1348-52 which afford abundant proof of the doctrine and practice regarding *sponsalia de praesenti*.

[4] POLLOCK AND MAITLAND, *op. cit.*, II, 369, where a translation of the epistle is given. *Cf.* BOHN, *Pol. Cyc.*, III, 319; SOHM, *Eheschliessung*, 124 ff., who discusses from the canons the influence of Alexander III. on this doctrine.

[5] This principle is illustrated in a suit for jactitation of marriage before the commissary of London, 1501: HALE, *Precedents*, 72, 73; and in a case of punishing clandestine marriage by prescribing penance by the same court in 1502: *ibid.*, 78, 79.

of affinity, consanguinity, and spiritual relationship.[1] "Reckless of mundane consequences, the church while she treated marriage as a formless contract, multiplied impediments which made the formation of a valid marriage a matter of chance."[2] The stringency of the law in this regard appears to be entirely inconsistent with the theory that marriage should be encouraged. But doubtless the apparent contradiction is due largely to the same ideas which shaped that theory. The Fathers dreaded the sins of the flesh through which the sacramental nature of marriage might be defiled;[3] and they may have felt a reaction against the freedom of the German custom touching the marriage of blood kindred.[4]

The development of the law of forbidden degrees, through the doctrines of the early Christian teachers and a long series of conciliar decrees, cannot here be described. In the thirteenth century the various rules were codified by the schoolmen under fifteen heads; "and their code has been accepted and acted upon by the greater part of western Christendom

[1] The canonists distinguished *cognatio* from *affinitas*. There are three sorts of *cognatio:* (1) *consanguinitas;* (2) *cognatio legalis*, or adoption; (3) *cognatio spiritualis*, arising in a participation in the same sacrament: ESMEIN, *op. cit.*, 335 ff., 374 ff. On the whole subject see NIEMEIER, *De conjugiis prohibitis*, comprising ten separate dissertations with critical and bibliographical "supplementa," but relating largely to post-Reformation doctrine; SANCHEZ, *Disput. de s^to mat. sac.*, II, 1-402; TANCRED, *Summa de mat.* (ed. WUNDERLICH), 16 ff.; the monograph of EICHBORN, *Die Ehehinderniss der Blutsverwandtschaft nach kan. Rechte* (Breslau, 1872); SCHULTE, *Lehrbuch*, 355-57; FRIEDBERG, *Lehrbuch*, 337, 359; SEHLING, *Die Wirkungen der Geschlechtsgemeinschaft* (impotence); GEARY, *Marriage and Family Relations*, 20 ff.; POLLOCK AND MAITLAND, *Hist. of Eng. Law*, II, 383 ff.; FREISEN, *Geschichte des can. Eherechts*, 371 ff.; JEAFFRESON, *Brides and Bridals*, I, 108 ff.; II, 306 ff.; MORGAN, *Marriage, Adultery, and Divorce*, I, 199 ff. The Catholic doctrine is set forth at great length by SCHEICHER-BINDER, *Praktisches Handbuch*, 8-354; and in PERRONE *De mat. christ.*, II, 31 ff.

[2] POLLOCK AND MAITLAND, *op. cit.*, II, 383 ff.

[3] ESMEIN, *op. cit.*, I, 87, 90, 335 ff., discusses the causes which produced this irrational and intricate system.

[4] KEMBLE, *Saxons*, II, 406-8; LINGARD, *Hist. Anglo-Saxon Church* (2d ed.), II, 5 ff. Gregory advises Augustine to relax the rules of the church in England so as to allow marriage beyond the second degree: HADDAN AND STUBBS, *Councils*, III, 20, 21. *Cf.* also ESMEIN, *op. cit.*, I, 344 ff.; EICHBORN, *Ehehinderniss*, 11 ff.

down to the present day."[1] For a time prohibition was extended to the seventh degree of consanguinity, counting, as did the canonists, in the collateral line, *from* the common ancestor and not *through* the same according to the Roman method.[2] A distinction, however, was made. Kinship in the sixth or seventh degree was held to be only "*impedimentum impediens*, a reason for a refusal to solemnize a marriage, not *impedimentum dirimens*, a cause which would render a marriage null;" and this doctrine was "received in England as well as elsewhere."[3] At the Lateran council of 1215 Innocent III. adopted the rule that "marriages within the fourth degree of consanguinity are forbidden and null."[4] But the doctrines of the church touching affinity and relationship did not therefore cease to perplex the courts, molest the happiness of individuals, and threaten the tranquillity of nations.[5] In England the perennial "deceased wife's sister" bill, the stubborn resistance to which has so long attested

[1] MEYRICK, "Marriage," in *Dict. Christ. Ant.*, II, 1092–1103. See also his article "Prohibited Degrees," *ibid.*, 1725–30; and ESMEIN, *op. cit.*, I, 205 ff.

[2] Thus, according to the Roman law, brother and sister are in the second degree; but by the canon law they are in the first degree. Second cousins by the canonists are regarded as in the third degree; by the Romans, as in the sixth (if they are equally distant from the common ancestor): MEYRICK, *op. cit.*, II, 1725; POLLOCK AND MAITLAND, *op. cit.*, II, 383–85; ESMEIN, *op. cit.*, I, 351 ff.; FREISEN, *Geschichte des can. Eherechts*, 371–439. For the eastern church see ZHISHMAN, *Das Eherecht der orient. Kirche*, 213–373.

[3] POLLOCK AND MAITLAND, *op. cit.*, II, 385; ESMEIN, *op. cit.*, I, 75 ff., 203–5.

[4] POLLOCK AND MAITLAND, *op. cit.*, II, 385.

[5] Much trouble grew out of the theory of spiritual affinity. Thus "in 1462, John Howthon, of Tonbridge, was sentenced by the Consistory Court of Rochester to be whipt three times round both market and church for having married Dionysia Thomas, for whom his former wife had been godmother. The like spiritual relation occasioned (Jan. 7, 1465) a dissolution of the marriage between John Trevennock and Joan Peckham; Letitia, the former wife of the said John having been godmother to a child of the said Joan." On December 29, 1472, William Lovelasse, of Kingsdown, was cited to appear "on a charge of having married his spiritual sister, viz., a woman whom his mother had held at her confirmation."—BURN, *Parish Registers*, 3, 4, notes, citing THORPE, *Customale*. The case of Henry VIII. and Catherine, wife of his elder brother Arthur, and the anecdote of Andowera and Fredegonda, wife of King Chilperic of Neustria (THIERRY, *Narratives of the Merovingian Era*, London, n. d., 20), are in point. On the evils of the complex system see THWING, *The Family*, 83; *Law Review* (English), I, 353 ff.; WOOLSEY, *Divorce*, 120 ff.; and especially HUTH, *Marriage of Near Kin*, 113 ff.

the amazing tenacity of theological prejudice, has not even yet successfully run the gauntlet of the House of Lords.[1]

The relation of the temporal to the spiritual courts in the administration of English matrimonial law was anomalous.[2] Strictly speaking, there was no lay jurisdiction whatever with regard to the genuineness of marriage. Only the ecclesiastical judge could determine whether a valid marriage existed.[3] In such a case the jury could not "declare the right." The question was referred to the spiritual court for decision. On the other hand, the law tribunal, without aid of the spiritual judge, could say whether or not there was a *de facto* marriage as opposed to a marriage *de jure*. The jury could determine, in a possessory action, whether there had been a public ceremony in face of the church. This was a decisive proof; for the mere fact of living together as husband and wife was not always conclusive.[4] "If a man and woman have gone through the ceremony of marriage at the church door, we may say that we have here a *de facto* marriage, a union which stands to a valid marriage in somewhat the same relation as that in which possession stands to ownership. On the other hand, if there has been no ceremony, we cannot in the thirteenth century say that there is

[1] ESMEIN, *op. cit.*, I, 203–402, gives an elaborate historical account of matrimonial impediments.

[2] The relation of the two jurisdictions is carefully examined by FRIEDBERG, *Eheschliessung*, 47–57, with citation of the principal cases; also in a very clear and interesting way by POLLOCK AND MAITLAND, *op. cit.*, II, 370 ff., to whom I am particularly indebted. *Cf.* GEARY, *Marriage and Family Relations*, 1–6.

[3] GLANVILLE, *Tractatus*, lib. vii, c. 13: PHILLIPS, II, 402. *Idem*, c. 14: PHILLIPS, II, 402, gives the form of writ by which a question of valid marriage is referred to the archbishop.

[4] See, however, FRIEDBERG, *op. cit.*, 51: "Lag aber die Frage vor, haben die Parteien wie Mann und Frau zusammen gelebt, haben sie sich verlobt, war mithin über das Recht der Ehe ['the right of marriage'] keine Entscheidung zu fällen, sondern allein über den factischen Thatbestand, so urtheilte der weltliche Richter." But this led to strange embarrassments. Thus it was in doubt whether a compulsory marriage belonged to the spiritual or to the temporal court: ROLLE, *Abridgment* (1688), I, 340; and "still greater was the doubt in case of the question, whether a second marriage were invalid if the first still existed": FRIEDBERG, *op. cit.*, 51 n. 2; *Year Book*, 49 Ed. III., 18.

a *de facto* marriage; mere concubinage, especially among the clergy, is far too common to allow us to presume a marriage wherever there is a long-continued cohabitation. But a religious ceremony is a different thing; it is definite and public; we can trust the jurors to know all about it; we can make it the basis of our judgments whenever the validity of the union has not been put in issue in such a fashion that the decision of an ecclesiastical court must be awaited."[1]

The practical application of this doctrine appears in the two cases of divorce and inheritance. Here the temporal courts tried indirectly to put a check upon clandestine marriages, to remedy the evils resulting from the scholastic dogma that mere consent secretly expressed in words of the present tense constitutes a valid marriage, by making the acquisition of certain property rights depend upon the publicity of the espousals.[2] The widow could not receive her dower unless it had been publicly assigned at the nuptials before the church door.[3] "The result is curious, for at first sight the lay tribunal seems to be rigidly requiring a religious ceremony which in the eyes of the church is unessential. . . . . We soon see, however, that what our justices are demanding is, not a religious rite nor 'the presence of an ordained clergyman,' but publicity. . . . . Marriages contracted elsewhere may be valid enough, but only at the

[1] POLLOCK AND MAITLAND, *op. cit.*, II, 378. *Cf.* FRIEDBERG, *op. cit.*, 56. "The canonists themselves having made marriages all too easy, and valid marriages all too difficult, had been driven into a doctrine of possessory marriage." In a case where a valid or canonical marriage could not be proved by the plaintiff, he was given a possessory action, *actio spolii*, and "in this the defendant will not be allowed to set up pleas which dispute, not the existence of a *de facto* marriage, but its validity," while the "plaintiff must prove a marriage celebrated in face of the church": POLLOCK AND MAITLAND, *op. cit.*, II, 379. *Cf.* ESMEIN, *op. cit.*, II, 15 ff.

[2] On the divergence of the temporal and ecclesiastical laws as to legitimacy see GLANVILLE, *Tractatus*, lib. vii, c. 15: PHILLIPS, II, 403. Compare SWINBURNE, *Of Spousals*, 15, 233 ff.

[3] FRIEDBERG, *Eheschliessung*, 50; POLLOCK AND MAITLAND, *op. cit.*, II, 372; BRACTON, *De leg. et consuetud.*, foll. 302-4; *idem*, *Note Book*, placita 891, 1669, 1718, 1875, MAITLAND'S ed., II, 688; III, 517, 559, 659.

church door can a bride be endowed. There is a special reason for this requirement. The common-law contrast to the church-door marriage is the death-bed marriage.[1] At the instance of the priest and with the fear of death before him, the sinner 'makes an honest woman' of his mistress. This may do well enough for the church, and may, one hopes, profit his soul in another world, but it must give no rights in English soil."[2] So also with regard to inheritance, in certain cases,[3] the lay court made the rights of children depend upon public solemnization of the nuptials, thus adopting the canonical theory of "putative marriages."[4] Although there may be no valid marriage on account of the existence of certain impediments, such as too near kinship, the children are nevertheless legitimate if the nuptials were publicly celebrated at the church door, and if at least one of the parents, at the time the children were begotten, was "ignorant of the fact which constituted the impediment." They are entitled to inheritance, though the parents are not really husband and wife. On this point in the thirteenth century church and state were at one;[5] but later a less

[1] *Ap.* BRACTON, *De leg. et consuetud.*, fol. 92; *Note Book*, pl. 891, 1669, 1718, 1875, MAITLAND'S ed., II, 688; III, 517, 559, 659.

[2] POLLOCK AND MAITLAND, *op. cit.*, II, 372, 373.

[3] GLANVILLE, *op. cit.*, lib. vii, c. 15: PHILLIPS, II, 403. For an interesting case, showing that the spiritual court could determine only the question of the validity of marriage, and not that of inheritance, which belonged to the king's courts, see *Corpus juris can.*, c. 17, x, 1, 29; c. 4, x, 4, 17; c. 7; quoted by FRIEDBERG, *op. cit.*, 50 n. 2.

[4] On "putative" marriages see ESMEIN, *op. cit.*, II, 33–37; FREISEN, *Geschichte des can. Eherechts*, 857–62; especially POLLOCK AND MAITLAND, *op. cit.*, II, 373–77.

[5] "To this agreement between church and state there was the one well-known exception: our temporal courts would not allow to marriage any retroactive power; the bastard remained incapable of inheriting land even though his parents had become husband and wife and thereby made him capable of receiving holy orders and, in all probability, of taking a share in the movable goods of his parents. . . . . But about all other matters the church could have, and apparently had, her way. . . . . 'You are a bastard, for your father was a deacon': that was a good plea in the king's court, and the king's court did nothing to narrow the mischievous latitude of the prohibited degrees."—POLLOCK AND MAITLAND, *op. cit.*, II, 375, 376. On legitimation through subsequent marriage by the canon law see ESMEIN, *op. cit.*, II, 37 ff.; SWINBURNE, *Of Spousals*, 233 ff.

liberal doctrine was adopted by the secular tribunals. "The ultimate theory of the English lawyers took no heed of good or bad faith, and made the legitimacy of the children depend on the fact that their parents while living were never divorced." [1]

The refusal of the church to prescribe a proper age condition for those entering matrimony led, as might be expected, to child marriages; and in this case the rules of the English common law only tended to magnify the evil. By the canonists the age of consent to marriage was fixed at seven years.[2] Thereafter a marriage formed without consent of parent or guardian, and even in opposition to it, was held to be legal; but it was "voidable so long as either of the parties to it was below the age at which it could be consummated. A presumption fixed this age at fourteen years for boys and twelve years for girls. In case only one of the parties was below that age, the marriage could be avoided by that party but was binding on the other. So far as we can see, this doctrine was accepted by our temporal courts." [3]

[1] POLLOCK AND MAITLAND, *op. cit.*, II, 375 n. 3; *ap.* PIKE, *Year Book*, 11-12 Ed. III., pp. xx-xxii.

[2] For the growth of the doctrines of the canonists as to the age of consent and the consequences of espousals before puberty see FREISEN, *Geschichte des can. Eherechts*, 323 ff.; ESMEIN, *op. cit.*, II, 149 ff., with whom POLLOCK AND MAITLAND, *op. cit.*, II, 387 ff., appear to agree. Read also JEAFFRESON, *Brides and Bridals*, I, 70 ff., 276 ff., who gives interesting illustrations of infantile betrothals and marriages; the learned monograph of HOFFMANN, *De aetate juvenili*, 22 ff.; LYNDWOOD, *Provinciale* (ed. 1505), liber quartus, fol. cxcvi; TANCRED, *Summa de mat.*, tit. 4, pp. 4, 5.

The constitution *De desponsatione impuberum* of the primate Edmund de Abingdon (1233-40) runs thus: "Ubi non est consensus utriusque non est conjugium. Igitur qui pueris dant puellas in cunabulis, nihil faciunt, nisi uterque puerorum, postquam venerit ad tempus discretionis, consentiat. Hujus ergo Decreti auctoritate inhibemus, ne de caetero aliqui, quorum uterque vel alter ad aetatem legibus constitutam et canonibus determinatam non pervenerit, conjungantur; nisi urgente necessitate pro bono pacis talis conjunctio toleretur."—LYNDWOOD, *Provinciale;* quoted by JEAFFRESON, *op cit.*, I, 74.

[3] POLLOCK AND MAITLAND, *op. cit.*, II, 387, 388, who cite as proof the case of Thomas of Bayeux and Elena de Morville. The king's court decided that Elena should remain in ward to the king until the age of puberty, that "she may then consent or dissent."

By the teaching of the common lawyers a widow of nine years of age at her husband's death could claim dower, though the marriage would have been voidable by her at the age of puberty.[1] The English temporal courts appear to have disregarded the canonical rule that a marriage is absolutely void when formed below the age of seven. "Coke tells us that the nine years old widow shall have her dower 'of what age soever her husband be, albeit he were but four years old,' and certain it is that the betrothal of babies was not consistently treated as a nullity. In Henry III.'s day marriage between a boy of four or five years and a girl who was no older seems capable of ratification, and as a matter of fact parents and guardians often betrothed, or attempted to betroth, children who were less than seven years old. Even the church could say no more than that babies in the cradle were not to be given in marriage, except under the pressure of some urgent need."[2] For such infant marriages, however, there were two practical motives during the Middle Ages. In England, just as in India and often among lower races,[3] the betrothal or espousal of very young children was a means of peaceful treaty or alliance; and the "rigour" of the feudal law was also in this way avoided.[4] "As deaths were early in those days, and wardship frequent, a father sought by early marriage of his son or daughter to dispose

[1] POLLOCK AND MAITLAND, *op. cit.*, II, 388: *ap.* LITTLETON, sec. 36; COKE upon Lit., 33*a*.

[2] POLLOCK AND MAITLAND, *op. cit.*, II, 388, 389, and the sources there cited.

[3] See above, chap. iv.

[4] "A treaty of peace involved an attempt to bind the will of a very small child, and such treaties were made not only among princes, but among men of humbler degree, who thus patched up their quarrels or compromised their law-suits. The rigour of our feudal law afforded another reason for such transactions; a father took the earliest opportunity of marrying his child in order that the right of marriage might not fall to the lord."—POLLOCK AND MAITLAND, *op. cit.*, II, 389. See the case of Grace, supposititious child of Thomas of Saleby, married at four years of age to Adam Neville, and after his death *sold* in marriage twice by King John: *ibid.*, 389, 390: *ap. Magna vita S. Hugonis*, 170–77; and in general on early marriages, especially as a means of alliance, compare ESMEIN, *op. cit.*, I, 151 ff.

of their hands in his lifetime, instead of leaving them to be dealt out to hungry courtiers who only sought to make as large a profit as they could from the marriage of the wards they had bought for that purpose;"[1] and the lord's right of marriage might in like manner be defeated by conferring knighthood upon a son in tender years.[2] Even as late as the age of the Tudors "much immorality resulted from the child marriages which were common in fashionable life."[3]

IV. PUBLICITY SOUGHT THROUGH BANNS AND REGISTRATION

Without doubt the wrong and confusion arising in the ecclesiastical theory and definition of marriage were manifold, and they were patent to every observer. At the Council of Trent it was asserted that some action to put a check upon clandestine marriages was demanded by all the temporal powers;[4] and the provincial church councils, aided by state legislation, had done what they could by imposing penalties to remedy the abuse.[5] Nevertheless, strange as it may seem to one not acquainted with the devious logic of scholastic theology, many members of the Council of Trent, on dogmatic grounds, were stubbornly opposed to the only reform which experience showed could be effective. They affirmed that severer discipline would suffice. They

[1] DENTON, *England in the Fifteenth Century*, 161. For an illustration of the lord's marriage rights see the case of 1220 (H. III.) in *Select Pleas of the Crown* (ed. MAITLAND), I, 135–38.

[2] "As knighthood prevented wardship, a father sometimes endowed his son with land to qualify him for knighthood at an early age, so as to bar the claims of the mesne lord or of the crown to wardship. An instance occurs of knighthood at the age of seven years avowedly procured for this reason."—DENTON, *Eng. in Fifteenth Century*, 261 n. 1: *ap.* SMITH, *Lives of the Berkeleys*, 140.

[3] TRAILL, *Social England*, III, 578.

[4] THEINER, *Acta gen.*, II, 334, 347, 351, 352, 391, 395: SALIS, *Pub. des trid. Rechts*, 10 n. 16. *Cf.* WATERWORTH, *Canons*, CCXXIII.

[5] So, for instance, in France: FRIEDBERG, *Eheschliessung*, 64 n. 5; and in Spain, *ibid.*, 74.

apologized for clandestine marriages on the pretext that they are sometimes useful, even necessary; or they denied that to declare them null would prove an efficient remedy.[1]

Hence we are better able to appreciate at its true value the significance for the Catholic world of the victory gained by the common-sense of the majority. It was a victory in favor of that publicity which the state demanded. Indeed, the church had already done something, in spite of dogma, to change marriage from a private to a public transaction. Her collision with the state, her anomalous position with respect to social order, was involuntary. She was caught, as it were, in the meshes of her own philosophy. Yet in the interest of morality she strove to secure publicity. The priest at the nuptials, declares Sohm, "appears first of all as a public person."[2] In particular the church tried to gain publicity for marriage by the institution of banns. The custom of publishing banns seems first to have made its appearance in France, probably as early as the fifth century.[3] It is enforced by the capitulary of 802, which gains its real significance from this fact, and not from the mention of the priestly benediction.[4] From France it gradually made its way into other countries of Europe. Thus in the year 1200, as already noted, banns were enforced by Archbishop Walter; and they were first made a general requirement by Innocent III. at the fourth Lateran council in 1215.[5] Later the English archbishops found it necessary from time to

[1] SALIS, *Pub. des trid. Rechts*, 11, 12, collates the evidence for the various opinions from THEINER, *Acta gen.*, II. *Cf.* FRIEDBERG, *op. cit.*, 108 ff.

[2] SOHM, *Eheschliessung*, 175.

[3] *Ibid.*, 181.

[4] Capit. 802, c. 35: WALTER, *Corpus juris germ.*, II, 167: "conjunctiones facere non praesumant, antequam episcopi presbyteri cum senioribus populi consanguinitatem conjungentium diligenter exquirant, et tunc cum benedictione jungantur." *Cf.* SOHM'S interpretation, *op. cit.*, 181, *vs.* that of FRIEDBERG, *Eheschliessung*, 59.

[5] See p. 314, above; and *cf.* POLLOCK AND MAITLAND, *op. cit.*, II, 368; FRIEDBERG, *op. cit.*, 10, 653, 654, for the present practice as to banns in various countries.

time to impose more stringent penalties for neglect of the proper publication of banns;[1] and they were enforced, without making the publication essential to a valid marriage, by the Council of Trent. From the twelfth century onward the marriage rituals contain directions for the asking and publication of banns;[2] while the punishment of persons guilty of violating the canons in this regard gave much employment to the spiritual courts during the Middle Ages.[3]

The institution of banns has a special historical interest as being in some sense the mediæval substitute for the modern registration and official license to wed. The practice was to announce the marriage, usually on three successive Sundays preceding the nuptials, that any objection on the ground of relationship or other disability might be brought forward. But the decrees of the church were not carefully enforced. Dispensation from the obligation to publish banns was the right of the bishop, but his license was usually granted only in favor of the nobility and higher classes; and the right constituted an important source of revenue.[4]

The year 1538 marks an important epoch in the administration of English matrimonial law. It was then, according to the researches of Burn, that parish registers of births, deaths, and marriages were first introduced; although before this time it had been customary in some places to inscribe

[1] JOHNSON'S *Canons*, II, 91, 340, 352, 395, 410.

[2] See the rituals of York, Sarum, Hereford, and others, in Surtees Society *Publications*, LXIII, 26 ff., Appendix, 17 ff., 115 ff., 155 ff.; and the Salisbury ritual in MASKELL'S *Monumenta*, I, 50 ff.

[3] For many cases see HALE'S *Precedents*, 6, 33, 38, 39, 54, 56, 65, 82, 83, 85, 92, 166, 181, 182, 199, 255.

[4] FRIEDBERG, *Eheschliessung*, 10, 124; ESMEIN, *Le mariage en droit canonique*, II, 170 ff., who shows that the rules relating to banns were too vague to be effective. On the requirement of banns see CRANMER, *Misc. Writings*, 159; GRINDAL, *Remains*, 126; HOOPER, *Later Writings*, 126, 138, 149; RIDLEY, *Works*, 531; SANDYS, *Sermons*, 434. *Cf.* on the history of the institution JEAFFRESON, *Brides and Bridals*, I, 99-107, 130 ff. Compare BORN, *De bannis nuptialibus* (Leipzig, 1716), secs. 1 ff.

such records in the missals and psalters of the church.[1] The first article of the injunctions issued by Thomas Cromwell, vice-regent under Henry VIII., provided: "*Item*, That you and every parson, vicar, or curate within this Diocese, for every Church keep one Book or Register, wherein he shall write the day and year of every Wedding, Christening, and Burial, made within your parish for your time, and so every man succeeding you likewise, and also there insert every person's name, that shall be so wedded, christened, and buried. And for the safe keeping of the same Book the parish shall be bound to provide of their common charges one sure coffer, with two locks and keys, whereof the one to remain with you, and the other with the Wardens of every parish wherein the said Book shall be laid up, which Book ye shall every Sunday take forth, and in the presence of the said Wardens or one of them, write and record in the same, all the Weddings, Christenings, and Burials made the whole week afore, and that done, to lay up the Book in the said coffer as afore; and for every time that the same shall be omitted, the party that shall be in the fault thereof, shall for-

[1] BUEN, *Hist. of Parish Registers*, 1-16. Compare WATERS, *Parish Registers*, 5. Mention is made of registers in France as early as 1308; and by an order of Cardinal Ximenes, 1497, they were to be kept in every parish of the diocese of Toledo "in order to remedy the disorders occasioned by the frequency of divorces in Spain, on the ground of spiritual affinity." — BUEN, 3; MARSOLIER, *Histoire du ministère du Cardinal Ximenes*, tom. 1, liv. 2, 263; WATERS, *Parish Registers*, 4. *Cf.* PALGRAVE, in *Quart. Rev.*, LXXIII, 561, who thus goes too far in saying that "parish registers were never kept *in any part of the world until the sixteenth century*."

There is some evidence, held to be inconclusive by BUEN, *op. cit.*, 5-15, that an order for the use of registers may have been made earlier than 1538. The fact that at least eight registers begin before that date points to instructions given at the time of the suppression of the smaller monasteries: WATERS, *op. cit.*, 6. At the time of the insurrection in Yorkshire, 1536, in order to draw the common people, it was given out "that the king designed to get all the gold of England into his hands, under colour of recoining it; that he would seize all unmarked cattle, and all the ornaments of parish churches, and they should be forced *to pay for christenings, marriages, and burials* (orders having been given for keeping Registers thereof), and for licenses to eat white bread." — CARTE, *Hist. of England*. See also the rare tract by Holmes (1537), and the letter of Sir Piers Edgcumb to Cromwell (April 20, 1539), both quoted by BUEN, *op. cit.*, 8, 9. For the date see WATERS, *op. cit.*, 7; and compare BUEN'S *Fleet Marriages*, 3.

feit to the said Church iij^{s}. iiij^{d}. to be employed on the reparation of the said Church."[1]

Thus in this, the most ancient English registration act, the parson or incumbent appears as the original registrar; and that the importance of keeping such record was keenly appreciated is shown by the anxious, almost painful, minuteness with which his duties are defined. The order of Henry VIII. was enforced or supplemented under Edward VI., Elizabeth, William III., and other monarchs; but, save during the Commonwealth, no material change was made in the mode of registration until in 1836 the present system was introduced.[2]

[1] BURN, *Parish Registers*, 17, 18. *Cf.* also FRIEDBERG, *Eheschliessung*, 319, 320. The same provision, with slight alteration, is contained in the injunction of 1547, Edward VI. It is quoted by TOULMIN SMITH, *The Parish*, 187, 188; BOHN, *Pol. Cyc.*, IV, 625; BURN, *op. cit.*, 18, 19.

[2] For a review of the various proposals, acts, and "visitations" to enforce them see BURN, *op. cit.*, 18–39; FRIEDBERG, *op. cit.*, 320–22; TOULMIN SMITH, *op. cit.*, 188, 189; BOHN, *op. cit.*, IV, 625, 626.

CHAPTER IX

THE PROTESTANT CONCEPTION OF MARRIAGE

[Bibliographical Note IX.—The ideas of the German Reformation, and therefore ultimately of Protestantism, relative to the form and the nature of marriage were molded by the thought of Martin Luther. Among his numerous writings on the subject most important are the "Vom heiligen Ehestandt und Oeconomia oder Haushaltung," being the thirty-sixth chapter of the *Tischreden* (folio, Frankfort, 1571); and the following articles in his *Bücher und Schriften* (folio, Jena, 1555–80): "Sermon vom ehelichen Stande" (1519, in Vol. I); "Predigten über das erste Buch Mose" (1527, in Vol. IV); and especially the "Von Ehesachen" (1530, in Vol. V). The principal passages from all of Luther's writings on the subject of matrimony and divorce, classified in seven groups, with critical and historical notes and marginal explanation of archaic words, are conveniently given in von Strampff's *Dr. Martin Luther: Ueber die Ehe* (Berlin, 1857). This is an important *Quellenbuch* for the student. A very useful book also, containing twelve of his most important papers, is the second volume of the *Kleinere Schriften Dr. Martin Luthers*, entitled "Von Ehe- und Klostersachen" (Bielefeld and Leipzig, 1877). Older works which afford some assistance are Niess's *Ehestands-Buch* (Eisleben and Leipzig, 1858), comprising, with other matter, some of the utterances of Luther; and Froböse's *Dr. Martin Luther's ernste, kräftige Worte über Ehe und eheliche Verhältnisse* (Hanover, 1825).

The first philosophical treatise on marriage, anticipating in various ways the modern conception, is Erasmus's *Christiani matrimonii institutio* (Basel, 1526). The dedicatory epistle, dated July, 1526, is addressed to Queen Catherine of England. The edition cited in the text bears the general title *De matrimonio christiano* (Lugd. Bat., 1650); and to it is appended Vivus's *Conjugii origine et utilitate discursus.* Erasmus's treatise may also be found in Vol. V of his *Opera omnia* (Lugd. Bat., 1704). The work was prohibited mainly because of its critical tone regarding the excessive ardor of the primitive Christians for celibacy and perpetual virginity. Of first-rate importance for obtaining a general view of the doctrines of the German Reformation is Sarcerius, *Vom heiligen Ehestande* (1553); or the same work enlarged under title *Corpus juris matrimonialis* (Frankfort, 1569). It has been found convenient to relegate the description of many writings available as sources for this chapter to Bibliographical Note XI. See particularly the works of

Brenz, Kling, Beust, Schneidewin, Melanchthon, Zwingli, Bullinger, Bucer, Monner, Bidembach, Mentzer, Brouwer, and Forster, there referred to. Besides Melanchthon's "De conjugio" (1551), in *Opera*, I (Erlangen, 1828), see also his "De arbore consanguinitatis et affinitatis" (1541), in Sarcerius, *Vom heiligen Ehestande*, lvs. xii–xxvii; or the "Corpus juris matrimonialis," lvs. xi–xxvii, where may also be found much additional matter from Luther, Kling, and others relating to forbidden degrees. In this connection may also be consulted Niemeier, *De conjugiis prohibitis dissertationes* (Helmstadt, 1705), comprising ten distinct essays, with a critical and bibliographical supplement, produced during the years 1699–1705.

The most important collection of church regulations regarding marriage is Richter's *Die evangelische Kirchordnungen des sechszehnten Jahrhunderts* (Weimar, 1846). These have been partly analyzed by Meier, *Jus, quod de forma matrimonii ineundi valet* (Berlin, 1856); and thoroughly by Goeschen, *Doctrina de matrimonio* (Halle, 1848). The rejection of priestly celibacy by the Reformers has called forth numerous writings, among which the earliest are Luther, *Bedenken und Unterricht von den Klöstern und allen geistlichen Gelübden* (1522); *idem*, *An die herrn deutschs Ordens* (original edition in the author's possession, Wittenberg, 1523); Bugenhagen, *De conjugio episcoporum et diaconorum* (1525); the anonymous *Underricht auss Göttlichen und Gaystlichen Rechten, Auch auss den flayschlichen Bepstlischen unrechten, ob ain Priester ain Eeweyb, oder Concubin . . . . haben möge* (1526). See also the elaborate treatise of Calixtus, *De conjugio clericorum* (Frankfort, 1653); and the dissertation of Roldanus, *De mente Pauli, volentis episcopum esse unius uxoris maritum* (Lugd. Bat., 1710).

On the famous "double marriage" of Landgrave Philip of Hesse a source of unique interest is the *Argumenta Buceri pro et contra*, a manuscript by Bucer written in 1539 and first published at Cassel in 1878. The original documents in the case are appended to the exceedingly lively work of Arcuarius, *Kurtze, Doch unpartheyisch- und Gewissenhaffte Betrachtung des . . . . Heiligen Ehestandes* (1679), decidedly inclining to the side of Luther and his colleagues. Beza, *Tractatio de polygamia* (Geneva, 1568), replies to the defense of polygamy by Ochino, *Dialogue* (Zurich, 1563; Eng. trans., London, 1657). The most celebrated book produced in this controversy is Theophilus Alethaeus's (Johann Lyser's) *Discursus politicus de polygamia* (2d ed., Freiburg, 1676); or the same with the prefixed general title, *Polygamia triumphatrix* (Londini Scanorum, 1682), this edition containing the learned and very elaborate notes of "Athenasius Vincentius" who is none other than Lyser himself. The first edition, in German, is entitled *Politischer Discurs zwischen Monogamo und Polygamo* (Freiburg, 1675). Lyser is harshly answered by Johann Frischen, *Unvorgreiffliche Erörterung der*

Frage: Was von der Polygamie oder Viel-Weiberey zu halten sey (Hamburg, 1677); and more coarsely by "Simplicius Christianus," *Eilfertiges Antwort-Schreiben . . . . Darin eine Summarische Widerlegung des politischen Discurs von der Viel-Weiberey, so ein Atheistischer Huren-Teuffel J. L. Bosshafftiglich ausgestreuet, enthalten ist* (Leipzig, 1677). In this connection see also Thomasius, *De concubinatu* (Halle, 1713); Baumgart, *De concubinatu, a Christo et apostolis prohibito* (Halle, 1713); N. N., *De licito concubinatu opponenda* (Freistadt, 1714); Michaelis, *Paralipomena contra polygamiam* (Göttingen, 1757); Swinderen, *De polygamia* (Groningae, 1795); Premontval, *La monogamie* (La Haye, 1751); or the translation by Windheim entitled *Des Herrn Premontvals Monogamie* (Nuremberg, 1753); Rantzow, *Discussion si la polygamie est contre la loi nat. ou divine* (St. Petersburg, 1774); and the works of Madan, Cookson, and others mentioned in the next chapter. An interesting monograph based on the correspondence of Bucer and the landgrave is Rady's *Die Reformatoren in ihrer Beziehung zur Doppelehe des Landgrafen Philipp* (Frankfort and Lucerne, 1890). Luther's alleged sensuality and coarseness of speech are examined by "Lutherophilus," *Das sechste Gebot und Luthers Leben* (Halle, 1893); with which may be read Altenrath, *Zur Beurtheilung und Würdigung Martin Luthers* (Frankfort, 1889).

Typical of an extensive literature in the sixteenth century, whose aim is the appreciation and elevation of marriage, is Adam Colbius von Buchen's *Christliche Predigten über das Buch Tobie, darinnen, als in einem lustigen Ehespiegel . . . . vom heyligen Ehestandt . . . . erkläret wirdt* (Frankfort, 1592). On the other hand, in contempt of womanhood and in mockery of wedlock was produced a mass of prose and verse coarse and unclean beyond description. Both kinds of writing—the evangelical *Ehespiegel* and the literature dedicated to "St. Grobian"—are treated in an instructive way by Kawerau, *Die Reformation und die Ehe* (Halle, 1892). To aid in obtaining a more complete conception of post-Reformation sentiment may also be consulted Agrippa, *De nobilitate et praecellentia foeminei sexus libellus* (Coloniae, 1532, 1567); Saxse, *Arcana annuli pronubi, Das ist: Geheimnis und bedeutung des Ehelichen Traw Ringes* (Leipzig, 1594); Müller, *Ungerathene Ehe, oder vornehmste Ursachen, so heute den Ehestand zum Wehestand machen* (Frankfort, 1674); Lehman, *Florilegium politicum auctum* (Frankfort, 1662); and Feyerabend, *De privilegiis mulierum* (Jena, 1672). Two learned general treatises, untouched by the Reformation doctrines, are Johannis Nevizianus's *Sylvae nuptialis libri sex* (Lugduni, 1556), containing a vast amount of curious matter ostensibly designed to aid in solving the question, "*An nubendum sit, vel non;*" and Antonius Gubertus Costanus's *De sponsalibus, matrimoniis et dotibus commentarius* (Marpurgi, 1597), dealing in a clear and scholarly

manner with the matrimonial institutions of the Hebrews, Greeks, Romans, and Christians under the canon law.

Several doctrines of Luther and the early Reformers have each produced a literature. Whether under various conditions parental consent is necessary to a legal or valid marriage is discussed by Lohen, *De parentum ad nuptias a liberis contrahendas consensu* (Regiomonti, 1685); Lauginger, *De consensu parentum ad nuptias liberorum* (Regiomonti, 1699); Schmalian, *De ambitu connubiali: Vom Frey-Werben* (Wittenberg, 1745); especially by the two great leaders of the "naturalistic" movement, Thomasius, *De validitate conjugii invitis parentibus contracti et per benedictionem sacerdotis depositi consummati* (Leipzig, 1689); Halle and Leipzig, 1722), and J. H. Boehmer, *De matrimonio coacto* (Halle, 1735). With the last-named dissertation may be read G. L. Boehmer's *De copulae sacerdotalis a deposito clerico furtim impetratae injusto favore* (Göttingen, 1745); Delbrück's *De matrimonio ad benedictionem sacerdotis incompetentis contracto* (Halle, 1759); and in general on the doctrine of espousals, Greiff, *De pactis futurorum sponsaliorum: von Ja-Wort* (Halle, 1712); Schelhas, *De clandestinis sponsalibus juratis: Vulgo von heimlichen Verlöbnüssen* (Jena, 1716); Bendeleben, *De diverso sponsalium et matrimonii jure* (Halle, 1718); Sahme, *De matrimonii legitimo absque benedictione sacerdotali* (Halle, 1722); Berger, *De praescriptione sponsaliorum* (Wittenberg, 1724); Richardus, *De conditionalibus sponsaliorum impossibilibus* (Halle, 1741; presented, 1701); Wachsmuth, *De exceptione sponsaliorum clandestinorum, ab ipso contrahente opposita* (Jena, 1754). See further, on special questions, Mentzer, *Num sponsis, ante solennem in ecclesiae copulationem et benedictionem, concubentibus, publica poenitentia juste imponatur?* (6th reprint, Wittenberg, 1728); Willenberg, *De matrimonio imparum* (Halle, 1727); Bennemann, *De natura matrimonii* (Halle, 1708); Krull, *De nuptiis* (Wittenberg, 1632); Schnetter, *De matrimonio cum damnato ad mortem contrahendo* (Halle, 1727; presented, 1679).

In the modern scientific literature of the subject the first place belongs to the general treatise of Richter, *Lehrbuch* (8th ed., Leipzig, 1886); the *Lehrbuch* of Friedberg (3d ed., Leipzig, 1889); and Scheurl's *Das gemeine deutsche Eherecht* (Erlangen, 1882). An older work, very thorough and very careful in the citation of the literature, is Hofmann's *Handbuch des teutschen Eherechts* (Jena, 1789); while, besides the books of Göschl, Lobethan, Schott, and Stäudlin elsewhere described, Loy's *Das protestantische Eherecht* (Nuremberg and Altdorf, 1793) is of service. Much valuable biographical and bibliographical material may be found in the great work of Schulte, *Die Geschichte der Quellen und Litteratur des canonischen Rechts* (Stuttgart, 1875–80). Important monographs are Schubert's *Die evangelische Trauung* (Berlin, 1890); Scheurl's *Die Entwicklung des kirchlichen Eheschliessungsrechts* (Er-

langen, 1877); Dieckhoff's *Die kirchliche Trauung* (Rostock, 1878); and there is an able article by Goeschen, "Ehe," in Herzog's *Encyclopaedie*, III (Stuttgart and Hamburg, 1855). For the present state of German matrimonial law consult Blumstengel, *Die Trauung in evangelischem Deutschland nach Recht und Ritus* (Weimar, 1879); Klein, *Das heutige Eherecht im Herzogthum Sachsen-Altenburg* (Strassburg, 1881); Stölzel, *Deutsches Eheschliessungsrecht nach amtlichen Ermittelungen* (3d ed., Berlin, 1876); and Hergenhahn's work elsewhere mentioned. Several early church ordinances, and a number of matrimonial decisions of rare interest from the consistory court of Wittenberg, commencing soon after its formation, are communicated by Schleusner, "Zu den Anfängen des protestantischen Eherechts," in *ZKG.*, VI, XII, XIII (Gotha, 1884, 1891, 1892). The "Bedencken" or ordinance adopted at Dresden in 1556 by the three Saxon consistories, with other matter, is also published by Muther, "Drei Urkunden zur Reformationsgeschichte," in Niedner's *Zeitschrift für historische Theologie*, XXX (Gotha, 1860). These same documents and also the famous case of Caspar Beyer (1543–44) are discussed by Mejer, "Anfänge des Wittenberger Consistoriums," in *ZKR.*, XIII (Tübingen, 1876). Mejer, "Zur Geschichte des ältesten protestantischen Eherechts," *ibid.*, XVI (Freiburg and Tübingen, 1881), gives an excellent historical, biographical, and bibliographical account of the Wittenberg consistory; and the two preceding articles, with a discussion of the establishment of the consistory of Rostock, are reprinted in his *Zum Kirchenrechte* (Hanover, 1891). Original material is communicated by Fischer, "Die älteste evangelische Kirchenordnung . . . . in Hohenlohe," in *ZKR.*, XV (Freiburg and Tübingen, 1880), and by Friedberg, *Aus der protestantischen Eherechtspflege des 16. Jahrhunderts*, reprinted from *ZKR.*, IV (Tübingen, 1864), containing, in connection with the case of Zaschwitz, letters and other papers of Melanchthon regarding forbidden degrees. Another article of Friedberg, "Beiträge zur Geschichte des brandenburgisch-preussischen Eherechts," *ibid.*, VI, VII (Tübingen, 1866–67), includes the very long petition of Dr. Stiel (1553) for enforcement of a betrothal, with other original documents relating to matrimonial doctrine and judicial practice. A history of "conditional marriages" is given by Phillips, "Das Ehehinderniss der beigefügten Bedingung," *ibid.*, V, VI (Tübingen, 1865–66); and the rise of the Protestant doctrine regarding the impediment of relationship is discussed by Scheurl, "Zur Lehre von dem Ehehindernisse der Verwandtschaft," *ibid.*, XVI (Freiburg and Tübingen, 1881). See also the monograph of Berg, *Ueber die Verbindlichkeit der kanonischen Ehehindernisse in Betriff der Ehen der Evangelischen* (Breslau, 1835).

On the controversy regarding "mixed marriages" and marriages of diverse religion, consult Gregorovius, *De mat. person. diversae relig.* (Regiomonti, 1712); Carpzovius, *Circa nuptias person. diversae relig.*

(Wittenberg, 1735); Breitenbach, *De mat. allophilorum* (Giessen, 1740); Zum-Bach, *Ueber die Ehen zwischen Katholiken und Protestanten* (Cologne, 1820); *Ueber die gemischten Ehen* (Stuttgart, 1827); Wittmann, *Katholische Grundsätze über die Ehen welche zwischen Katholiken und Protestanten geschlossen werden* (Stadtamhof, 1831); Kutschker, *Die gemischten Ehen von dem katholisch-kirchlichen Standpuncte* (Vienna, 1838); *Nationaler und historischer Standpunkt* (Cologne and Vienna, 1838); Sack, *Die katholische Kirche innerhalb des Protestantismus* (Cologne, 1838); Bessel, *Die gemischten Ehen* (Frankfort, 1839); Mack, *Die Einsegnung der gemischten Ehen* (Tübingen, 1840); Perronne, *Ueber die gemischten Ehen* (Augsburg, 1840); *Eintracht gibt Macht oder . . . . Nothwendigkeit zu einem gleichmässigen Verfahren in Hinsicht auf die gemischten Ehen* (Düsseldorf, 1844); *Die gemischten Ehen in der Erzdiöcese Freiburg* (Regensburg, 1846); Binterim, *An matrimonio mixto* (Düsseldorf, 1846); *idem*, *Dissertatio altera* (Düsseldorf, 1847); *Der Streit über gemischte Ehen . . . . in Baden* (Karlsruhe, 1847); *Beleuchtung* [of the foregoing] *Karlsruher Schrift* (Schaffhausen, 1847); Hilse, *Civil- und Misch-Ehe* (Berlin, 1869); and Hübler, *Eheschliessung und gemischte Ehen in Preussen* (Berlin, 1883).

For England the principal source is the *Works of the Fathers and Early Writers of the Reformed English Church*, published by the Parker Society (Cambridge, 1841–55). Among the large number of books comprised in this series, those of Latimer, Cranmer, Tyndale, Jewell, Hooper, Bullinger, Parker, Coverdale, and particularly Whitgift's *Defence of the Answer* (containing also Cartwright's *Reply to the Answer*) have been of most service. Three important treatises of the English Reformation period bearing on marriage and the family are Coverdale's translation of *The Christen State of Matrimonye* (1541); Whitforde's *A Werke for housholders* (1530, 1537); and Vives's (Vivus's) *A very frvteful and pleasant booke called the Instruction of a Christen Woman . . . . tourned out of latyne into Englische by Rycharde Hyrde* (London, 1557). The original may be found in Vol. II, 650–755, of Vives's *Opera* (Basel, 1555); and Rudolph Heine has a German translation in Vol. XVI of Richter's *Pädagogische Bibliothek* (Leipzig, n. d.). Much valuable material may also be found in Gee and Hardy's *Documents* (London, 1896); Prothero's *Select Statutes and Other Constitutional Documents* (Oxford, 1894); while the *Statutes at Large* (Raithby, London, 1811) are of course in constant requisition. The more important acts relating to marriage are contained in Vol. I of Evans's convenient *Collection of Statutes* (London, 1823). Swinburne's fascinating *Treatise of Spousals* (London, 1686), written in the last days of Elizabeth's reign, but published a century later, is indispensable for understanding the law and theory of the matrimonial contract during the Tudor period.

Some assistance has also been gained from the collections of Hale, Johnson, and Wilkins mentioned in preceding notes.

The exhaustive treatment of the Protestant conception of marriage for Germany contained in Friedberg's great work on *Eheschliessung* (Leipzig, 1865), supplemented by his suggestive monograph *Geschichte der Civilehe* (Berlin, 1877), leaves little for others to do. Sohm's *Eheschliessung* is also important. For England Makower has a brief but excellent discussion; and much illustrative material may be found in Burn's *Parish Registers* (London, 1862); Wood's *Wedding Day* (New York, 1869); Douce's *Illustrations of Shakespeare* (London, 1807); Brand's *Popular Antiquities* (new ed., London, 1873–77); Burnet's gossipy *History of the Reformation* (London, 1850); and Jeaffreson's *Brides and Bridals* (London, 1872). Nichols, *Progresses . . . . of King James the First* (London, 1828), gives an interesting example of the former practice of public betrothals; and the same may also be found in Leland's *Collectanea*, V (2d ed., London, 1770). Queen Mary's Articles (1553) regarding married priests and some other important papers are given in Cardwell's *Documentary Annals* (Oxford, 1839, 1844). Palmer's *Origines liturgicae* (3d ed., Oxford, 1839; 4th ed., London, 1845) has also been of service; while new light is thrown on social conditions in Elizabeth's reign by the unique collection of documents edited for the Early English Text Society by Furnivall, *Child-Marriages, Divorces, and Ratifications* (London, 1897).]

I. AS TO THE FORM OF MARRIAGE

THE Protestant Reformation in Germany produced many ideas which were eventually fruitful for good in the history of matrimonial law; but unfortunately, owing to a number of causes, more than two centuries were to elapse before any effective remedy was provided for the evils of clandestine wedlock. Ecclesiastical rites were prescribed by the authority of the state as the best means of securing publicity; but neither Luther[1] nor the other Protestant leaders insisted upon them as necessary to a binding marriage.[2]

[1] See the extracts illustrating Luther's views as to the form of wedlock in STRAMPFF, 337–44.

[2] Consult the elaborate investigation of FRIEDBERG, *Eheschliessung*, 198–305; *idem*, *Die Geschichte der Civilehe*, 7 ff.; with which should be compared SOHM, *Eheschliessung*, chap. vii, and his *Trauung und Verlobung*, chap. iv.; SCHEURL, *Ent. des kirch. Eheschliessungsrechts*, 123 ff., 126 ff.; *idem*, *Das gemein. deutsch. Eherecht*, 64–73; DIECKHOFF, *Die kirch. Trauung*, 108 ff., 180 ff., 223 ff. (views of Melanchthon, Chemnitz, and others); MEJER, *Zum Kirchenrechte*, 154 ff. (views of Kling, Mauser, Schneidewin, Wesenbeck, Monner, and Beust — all connected with the consistory of Wittenberg); SCHUBERT, *Die evang. Trauung*, 41 ff., 49 ff.; RICHTER, *Lehrbuch*, 1136 ff.

Luther, indeed, perceived the absurdity of the scholastic distinction between *sponsalia de praesenti* and *de futuro;* and proposed to retain espousals *de futuro* or precontracts only in the sense of "conditional betrothals."[1] On failure of the condition, or for other weighty reasons, these engagements might be dissolved. But unconditional betrothals, or his *sponsalia de praesenti*—that is to say, practically all betrothals, including the espousals *de futuro* of the canonists—if publicly made and with parental consent, were regarded by Luther as valid marriages which could not be dissolved.[2] Parental consent[3] he appears to think essential, though on

[1] "Das liess ich wohl verba de futuro heissen, wenn ein conditio, Anhang oder Auszug dabei gesetzt würde, als: Ich will dich haben, wo du mir willt zu gut, zwei oder ein Jahr harren; item: Ich will dich haben, so du mir hundert Gulden mitbringest; item: so deine oder meine Aeltern wollen; und dergleichen."—LUTHER, "Von Ehesachen," *Bücher und Schriften* (Jena, 1561), V, 241.

As an illustration of the early judicial practice see the interesting decision of the consistory court of Wittenberg, among the cases published by SCHLEUSNER, *Anfänge des protest. Eherechts*, 136, where a contract is dissolved for failure of the condition. The case is undated, but it probably occurred before 1550.

Conditional espousals were recognized by the canon law: for England see SWINBURNE, *Of Spousals*, 109–53, where the many intricate questions connected with conditional contracts are discussed with much learning; and in general the monograph of RIEDLER, *Bedingte Eheschliessung* (Kempten, 1892).

With Luther's views regarding conditional betrothal compare those of Melanchthon, "De conjugio," *Opera omnia*, I, pars ii, 232; SCHNEIDEWIN, *De nuptiis*, tit. x, "De spons.," pars i, 32–38; BEUST, *De spons. et mat.*, secs. xviii, xix; KLING, *Tr. mat. causarum*, foll. 73 ff.; BROUWER, *De jure con.*, 188–204. For discussion see SCHLEUSNER, "Zu den Anfängen des prot. Eherechts," *ZKG.*, VI, 402–5; SCHEURL, "Zur Geschichte des kirch. Eheschliessungsr.," *ibid.*, XV, 69, 70; *idem*, *Das gemein. deutsche Eherecht*, 368–70; RICHARDUS, *De cond. sponsaliorum impossibilibus*, 29 ff., *passim;* RICHTER, *Lehrbuch*, 1061 ff., 1200; and especially the excellent historical paper of PHILLIPS, "Das Ehehinderniss der beigefügten Bedingung," *ZKR.*, V, VI, 153 ff., reviewing the literature of the subject from the sixteenth to the nineteenth century; SCHOTT, *Einleit. in das Eherecht*, 199 ff.

[2] For a collection of the writings of Luther on precontracts or betrothals see STRAMPFF, 287–334; especially the extract from the *Von Ehesachen*, 334, where breach of troth is made equivalent to adultery.

[3] The passages of Luther's works on parental consent, with an introductory note, are collected in STRAMPFF, 299–325. Compare BEUST, *De spons. et mat.*, 201–10; MELANCHTHON, "De conjugio," *Opera omnia*, I, pars ii, 231; BULLINGER, *Der Christlich Ehestand*, lvs. 11 ff., 14, 15; KLING, *Tr. mat. causarum*, foll. 77 ff.; SCHNEIDEWIN, *De nuptiis*, tit. x, "De nupt. licitis," pars ii, secs. 29 ff.; BRENZ, "Wie yn Ehesachen . . . . zu Handeln," in SARCERIUS, *Vom heil. Ehestande*, foll. 69 ff.; MENTZER, *De conjugio tr.*, 136–50, 153; BIDEMBACH, *De causis mat. tract.*, 3 ff., 15 ff.; FORSTER, *De nuptiis*, 145 ff., 149 ff. (the law of Saxony requiring); BROUWER, *De jure connubiorum*, 71 ff., 76 ff., 89 ff.

All authorities, seemingly, are agreed that a parent may not rightly force a child to marry; see BULLINGER, *Der christlich Ehestand*, lvs. 15, 16; SCHNEIDE-

this point his statements are by no means clear;[1] and he urges the need of public espousals in face of the parish.[2] Yet he admits that a secret engagement — by which he seems to mean espousals without the presence of witnesses, but with parental consent — if followed by physical union, constitutes a true marriage equally binding with the open betrothal. In effect, the doctrine of Luther did not provide a complete remedy for the evils of clandestine contract; for all marriages, save only the conditional when not consummated, and possibly those formed secretly against the parents' will, were now indissoluble at the will of the parties.[3]

WIN, *De nupt.*, tit. x, "De nupt. licitis," pars ii, secs. 41, 42; SARCERIUS, *Vom heil. Ehestande*, foll. 73 ff.; 96 ff. (Luther); MENTZER, *De conjugio tr.*, 253–55; BIDEMBACH, *De causis mat.*, 25–27; BOEHMER, *De mat. coacto;* and the literature on parental consent described in Bibliographical Note IX.

[1] In his "Von Ehesachen" (1530), *Bücher und Schriften*, V, 247, he says directly that a public betrothal, that is a marriage, not followed by *copula* should yield to an earlier secret betrothal *cum copula*. It is argued, however, that by "secret" he means a betrothal without witnesses, but with consent of the parents: FRIEDBERG, *Eheschliessung*, 209 n. 2, 210 n. 1; SOHM, *Eheschliessung*, 206 n. 16. LUTHER'S "Von Ehesachen," *Bücher und Schriften*, V, 237–57, is mainly devoted to a discussion of secret and public betrothals.

As a matter of fact, I find the consistory court of Wittenberg dissolving a betrothal for lack of parental consent: SCHLEUSNER, *Anfänge des protest. Eherechts*, 137. In another interesting case a girl was persuaded by her lover to marry him without the consent of her mother or step-father, but saying: "I would not, however, offend my dear mother." The two clerical judges held the contract to be conditioned on getting the mother's consent, and therefore void, since the condition had not been fulfilled and the law of Saxony forbade marriages without parental consent. The two lay judges, however, held the contract binding, because the girl's father being dead, to whom real authority belonged, she was free to marry whom she chose. The case was referred to Luther and another person as arbiters. Luther, in opposition to his associate, held the marriage void because conditional and a violation of the fourth commandment, and the court accepted his opinion: SCHLEUSNER, *op. cit.*, 138, 139.

[2] The consistory court of Wittenberg declared a public betrothal legal as opposed to an earlier secret engagement: see the case in SCHLEUSNER, *Anfänge des protest. Eherechts*, 140; and for other cases *cf. ibid.*, 145, 146.

[3] On espousals, especially clandestine contracts, compare SCHNEIDEWIN, *De nuptiis*, tit. x, "De spons.," pars i, secs. 1 ff., 21 ff.; BEUST, *Tr. de spons. et mat.*, 1 ff., 12 ff., 27 ff. (*sponsalia clandestina*); KLING, *Tr. mat. causarum*, lvs. 1 ff., 6 ff., 68 ff. (*sponsalia clandestina*); SARCERIUS, *Vom heil. Ehestande*, foll. 67 ff., 91 ff., 73 ff. (Luther); MENTZER, *De conjugio tr.*, 156 ff., 168 ff.; BIDEMBACH, *De causis mat. tr.*, 3 ff., 29–35; FORSTER, *De nuptiis*, 52 ff.; BROUWER, *De jure connubiorum*, 9 ff., 100 ff.; and the literature on *sponsalia* mentioned in Bibliographical Note IX.

For discussion see SCHEURL, *Die Entwick. des kirch. Eheschliessungsrechts*, 130 ff., 140 ff.; SCHUBERT, *Die evang. Trauung*, 44 ff.; CREMER, *Kirch. Trauung*, 68–71; DIECK-

Moreover, an action was allowed to enforce a promise of marriage; and for more than two centuries after the Reformation the fulfilment of a betrothal could be enforced by severe penalties.[1] Yet in one respect there was a decided advance. The pernicious distinction of Peter Lombard between espousals *de praesenti* and *de futuro* was practically rejected, and with it much of the danger which had lurked in the vacillating discretion of the ecclesiastical judge might have been removed had the jurists accepted Luther's teaching.[2] Thus from a historical point of view the result is instructive. The ancient *wette* or *beweddung*, handed down through the slightly weakened form of the canonical *sponsalia de praesenti*, was restored to even more than its original relative importance as compared with the *Trauung* or nuptials.[3]

HOFF, *Die Kirch. Trauung*, 189 ff., 212 ff., 221 ff.; RICHTER, *Lehrbuch*, 1121, 1194 ff.; FRIEDBERG, *Lehrbuch*, 295, 296, 337-59; LOY, *Das protest. Eherecht*, 425 ff., 437 ff., 445, 447 ff.; HOFMANN, *Handbuch des teutschen Eherechts*, 27 ff., 143, 146 ff.; SCHOTT, *Einleitung in das Eherecht*, 174 ff., 182 ff., 193; SOHM, *Eheschliessung*, 197-249.

[1] The most famous case of enforcement of a betrothal, against an unwilling bride, is that of Dr. Stiel, 1553. The plaintiff's petition (*Gesuch*) in fifty-eight articles or specifications, setting forth in a most realistic way the whole courtship and the betrothal proceedings, is communicated by FRIEDBERG, "Beiträge zur Geschichte des brand.-preuss. Eherechts," *ZKR.*, VI, 72 ff. Actual force to compel the fulfilment of a betrothal was used only when it was followed by *copula: ibid.*, 81. Friedberg traces the history of the subject to the reign of Frederick the Great, citing various cases. As a result he declares that in the sixteenth century betrothed persons could be forced to keep their engagement even when both were willing to dissolve it; while in the eighteenth century action depended upon the will of the interested parties: *ibid.*, 87, 88. Compare BIDEMBACH, *De causis mat. tr.*, 35 ff.

[2] See the argument of SOHM, *Eheschliessung*, 202 ff.; *Trauung und Verlobung*, 110 ff.; against FRIEDBERG, *Eheschliessung*, 206, 210; *Geschichte der Civilehe*, 8, who holds that Luther *doubled* the evils of secret marriage.

[3] SOHM, *Eheschliessung*, chap. vii, *Trauung und Verlobung*, chap. iv, has demonstrated this against the view of Friedberg.

Nevertheless by the middle of the seventeenth century was established a dualism in effect similar to that which had existed under the later canon law. More and more stress was placed upon the nuptials as compared with the betrothal, although in theory the latter still constituted the marriage. J. H. BOEHMER, *Jus ecclesiasticum protestantium* (Halle, 1714), whose teaching has mainly determined the modern law, attacked Luther as being responsible for this dualism, holding that a true betrothal, like the Roman *sponsalia*, is only a promise of future wedlock, and may therefore be dissolved; while the nuptial contract, publicly and formally made, is the true marriage. On Boehmer's doctrines see DIECKHOFF, *Die kirch. Trauung*, 270-95; SCHUBERT, *Die evang. Trauung*, 62-76; SCHEURL, *Kirch. Eheschliessungsrecht*, 140 ff.; PHILLIPS, "Das Ehehinderniss der beigefügten Bedingung," *ZKR.*, VI, 154.

The teachings of Luther regarding espousals were largely determinative for the future history of marriage in the German states. According to the ordinances, the doctrine, and the practice of the evangelical churches, the betrothal was a true marriage, the nuptials merely its confirmation.[1] Even his wavering as to the necessity of parental consent for a valid contract leaves its trace in the divergent provisions of law.[2] In practice the jurists, against the protest of Luther,[3] held close to the principles of the canon law.[4] As a rule, the courts tended to treat all secret betrothals followed by actual connubial life as binding marriages.[5] Until far down into the eighteenth century the engaged lovers before the nuptials were held to be legally husband and wife.[6] It was common for them to begin living together immediately after the betrothal ceremony;[7] and the so-called "bride children"

[1] SOHM, *Eheschliessung*, 198.

[2] The church ordinances require sometimes only parental consent; sometimes only witnesses; or again the solemnization of the betrothal in church is prescribed, with the sanction of nullity or else a mere penalty for non-observance: SOHM, *op. cit.*, 206, 207; FRIEDBERG, *Eheschliessung*, 212 ff., 224, 225. RICHTER'S *Evangelische Kirchenordnungen* are analyzed by MEIER, *Jus, quod de forma mat. valet*, 49 ff.; and GOESCHEN, *Doctrina de mat.*, 42 ff.

[3] FRIEDBERG, *op. cit.*, 225 ff.

[4] Luther would have entirely rejected the canon law, but even in his immediate environment he gained no following. Theologians and jurists alike accepted it as generally valid, giving it precedence over the Roman law. Only the Scriptures were a higher authority. Compare MEJER, *Zum Kirchenrechte*, 170, 156 (Kling); *idem*, in *ZKR.*, XVI, 44-48, 73.

[5] SOHM, *op. cit.*, 207; FRIEDBERG, *op. cit.*, 209, 225-27, 261, 277 ff. The famous case of Caspar Beyer came before the consistorial court of Wittenberg in the latter part of 1543; and its decision in 1544 led to the notorious controversy between Luther and the jurists. Beyer wanted to marry Sibylla, a ward of Melanchthon, but he had made a clandestine contract with another woman without consent or knowledge of her parents; although it was alleged that her brother had given *post facto* assent, the parents being perhaps dead. Luther declared that such secret betrothals "sollen schlecht keine Ehe stiften;" and in 1539 or 1540 a law of Saxony had forbidden them. A decision of the consistory, following the doctrine of the canon law, sustained the validity of Beyer's marriage; but after a "starke Predigt" and long insistence by Luther it was overruled by the Elector: MEJER, "Anfänge des Witt. Consistoriums," *ZKR.*, XIII, 28-123; *idem*, *Zum Kirchenrechte*, 65 ff.

[6] SOHM, *op. cit.*, 198; FRIEDBERG, *op. cit.*, 208, 209, 225-27, 261, 277 ff., 299, 300.

[7] In Germany betrothal rituals were sometimes prescribed in the church ordinances: FRIEDBERG, *op. cit.*, 222, 223, 224; and public espousal ceremonies were in use in England: BURN, *Parish Registers*, 138 ff.

were given rights of legitimate offspring, this custom in part surviving until our own times.[1]

The rites observed in the celebration of marriage differed in some details from those in use before the Reformation. A model was drafted by Luther, and it was often followed with variations in the church ordinances.[2] He does not urge the adoption of a service which must be observed by all. On the contrary, every place may use its customary form in the solemnization of wedlock. A simple ritual is, however, provided for the use of those needing assistance. When the bride and bridegroom so require, the banns are to be asked in the chancel before the wedding. As in the mediæval formularies already examined, the nuptial ceremony consists of two acts. Before the church door the wedding vows and the wedding rings are exchanged, the priest declaring to the assembled people, in the name of the Trinity, that he pronounces the man and woman joined in marriage. In the church before the altar the second act takes place. Instead of the bride-mass, this consists simply in the reading of a passage of Scripture followed by the priestly benediction.[3]

[1] FRIEDBERG, *op. cit.*, 293, 299, 300. On the *Brautkinder* see SCHOTT, *Einleit. in das Eherecht*, 193, 194; and on secret betrothals and the laws forbidding them consult especially HOFMANN, *Handbuch des teutschen Eherechts*, 146 ff.; and compare LOY, *Das protest. Eherecht*, 447 ff.

[2] The earliest Protestant marriage ritual appears to have been written by BUGENHAGEN: see the ritual (1523) ascribed mainly to him, published with discussion by SCHUBERT, *Die evang. Trauung*, 142–53. Compare "Der Bericht Christoph Gerungs von Memmingen über die erste Priesterhochzeit zu Augsburg anno 1523;" *ibid.*, 132–41, showing that the nuptial ceremony is but a confirmation of the *sponsalia de praesenti* already concluded.

[3] LUTHER, "Traubüchlein für die einfältigen Pfarrherren" (1534), *Kleinere Schriften*, II, 219–23; with which compare "Der kleine Katechismus" (1529), in STRAMPFF, 340, 341, 422; and the rituals analyzed by SOHM, *op. cit.*, 197 ff. In this connection read BULLINGER'S discussion of the proper conduct at weddings in *Der christlich Ehestand*, lvs. 59–68; or the same in SARCERIUS, *Vom heil. Ehestande*, foll. 102–7; also BIDEMBACH, *De causis mat. tr.*, 3 ff.; FORSTER, *De nuptiis*, 167 ff.; and BROUWER, *De jure connubiorum*, 619 ff.

DIECKHOFF, *Die kirch. Trauung*, 108–14, points out that the exchange of rings and the declaration of the marriage to the assembled people, instead of saying to the parties themselves the words "*Ego conjungo vos in nomine*," etc., are innovations of the Reformation period. For further discussion see SCHUBERT, *Die evang. Trauung*,

The decree of the Council of Trent relating to the nuptial celebration was not accepted in Protestant lands, and hence no essential change was made in the forms of marriage. In England during the whole period between the Reformation and the Commonwealth ecclesiastical celebration was the rule; and the spiritual courts, retaining their ancient jurisdiction in matrimonial causes, still recognized the principles of the canon law, though appeals to Rome were not allowed.[1] Hence clandestine contracts *de praesenti* were valid and could be maintained against regular marriages subsequently solemnized in church. This fact is established by abundant evidence,[2] and by none more ample and convincing than that

51 ff.; HOFMANN, *Handbuch des Eherechts*, 172 ff.; RICHTER, *Lehrbuch*, 1121 ff.; SCHEURL, *Das gemeine deutsche Eherecht*, 63 ff.

For examples of rules and rituals adopted by some of the churches consult RICHTER, *Evang. Kirchenordnungen*, I, 31, 32 ("Landesordnung des Herzogthums Preussen"), 330, 331 (Brandenburg), 347–50 (Geneva); II, 47, 48 ("Cölnische Reformation"), 375–77 (Brandenburg); especially FISCHER, "Die älteste evang. Kirchenordnung in Hohenlohe," *ZKR.*, XV, 1–48; and compare MEIER, *Jus, quod de forma mat. valet*, 49 ff.; GOESCHEN, *Doctrina de mat.*, 48–58; FRIEDBERG, *Eheschliessung*, 212 ff.; SOHM, *Eheschliessung*, 197 ff., who analyzes the church ordinances.

[1] By 24 Hen. VIII., c. 12 (1532): *Statutes at Large*, II, 71–73; GEE AND HARDY, *Documents*, 187–95, appeals to Rome in questions of marriage and divorce are forbidden. Such cases may be carried from the archdeacon to the bishop, then to the archbishop of Canterbury or York, whose decision is final. By 25 Hen. VIII, c. 21: *Statutes at Large*, II, 90, the archbishop of Canterbury is given a right of dispensation similar to that formerly exercised by the pope. Chapter 19 of the same statute, *ibid.*, II, 85–87; GEE AND HARDY, *Documents*, 195 ff., provides for the appointment of a commission of thirty-two men to examine the whole body of canons in order to determine which should be accepted as valid; but until the commission should conclude its labors "such Canons Constitutions Ordinances and Synodals Provincial being already made," not repugnant to the laws or customs of the realm, "nor to the Damage or Hurt of the King's Prerogative Royal, shall now still be used and executed as they were afore." No report was made by this commission; nor did the *Reformatio legum ecclesiasticarum* prepared by another commission, which was provided for by 3 and 4 Ed. VI., c. 11: *Statutes at Large*, II, 295, ever take effect: FRIEDBERG, *Eheschliessung*, 310 n. 3. The act of 25 Hen. VIII., c. 19, was repealed by 1 and 2 Philip and Mary, c. 8: *Statutes at Large*, II, 342 ff.; but again restored by 1 Eliz., c. 1: *Statutes*, II, 379 ff. So the result was the practical retention of the canon law. *Cf.* FRIEDBERG, *op. cit.*, 309–11.

[2] It is proved by the celebrated case of Bunting *v.* Lepingwell, 1585–86: COKE'S *Reports*, II, 355–59. See FRIEDBERG'S analysis of this case and other proofs collected by him: *Eheschliessung*, 313–18; also SWINBURNE, *Of Spousals*, 13, 15, 74–108, especially 193 ff., 222 ff., 236–39, who shows the canon-law theory to be in full force in the reign of Elizabeth; and CRANMER, *Misc. Writings*, 359, 360. HALE'S *Precedents*, 120, 136, 137, 146, 147, 169, 170, 185, 192, affords several interesting illustrations for the Reformation period.

afforded by the remarkable collection of documents recently edited by Furnivall, to which further reference will presently be made.[1] But the parties were subject to clerical censure and the forfeiture of certain property rights.[2] An attempt was, indeed, made by Henry VIII. in 1540 to restrict the validity of private marriages by providing in effect that those solemnized by the church, if consummate, should take precedence of unconsummated precontracts not thus celebrated; and the same statute confined the impediments to marriage to those comprised in the Levitical degrees.[3] But this act had little significance save in the matrimonial transactions of Henry himself;[4] for, so far as it related to precontracts, it was repealed by a statute of Edward VI. which restored the former law and provided that "when any cause or contract of marriage is pretended to have been made, it shall be lawful to the king's ecclesiastical judge of that place to hear and examine" it; and after having it "sufficiently and lawfully proved," to give "sentence of matrimony, commanding solemnization, cohabitation, consummation, and tractation," as in times past the king's spiritual courts had power to do.[5] Referring to this act, Swinburne, writing in the reign of Elizabeth, bears witness to the strength with which the canonical theory of espousals had laid hold of the legal mind. "Worthily, I say, and upon good ground was this Branch of that Statute" of King Henry relating to precontracts "repealed and made void by his gracious Son King *Edward*

[1] FURNIVALL, *Child-Marriages, Divorces, and Ratifications, in the Diocese of Chester, 1561-6* (edited for the Early Eng. Text Society, London, 1897), especially 56-71, 184-202 (trothplights), 140, 141 (clandestine marriages), 72-102 (adulteries and affiliations).

[2] SWINBURNE, *Of Spousals*, 15, 233-35; FRIEDBERG, *op. cit.*, 315 n. 4.

[3] 32 Hen. VIII., c. 38: *Statutes at Large*, II, 173, 174; EVANS, *Statutes*, I, 152-54. The act of 25 Hen. VIII., c. 22: EVANS, I, 151, prescribes the Levitical degrees.

[4] FRIEDBERG, *op. cit.*, 311, 312. See the elaborate discussion of the divorce controversy by BURNET, *Hist. of the Reformation*, I, 26 ff., particularly 74 ff.

[5] 2 and 3 Ed. VI., c. 23: *Statutes at Large*, II, 284, 285; EVANS, *Statutes*, I, 154, 155. *Cf.* JEAFFRESON, *Brides and Bridals*, I, 114 f., 124 ff.

the Sixth, for Spousals *de praesenti*, though not consummate, be in truth and substance very Matrimony, and therefore perpetually indissoluble, except for Adultery: Although by the Common Laws of this Realm (like as it is in *France* and other places) Spousals not only *de futuro*, but also *de praesenti* be destitute of many *legal Effects* wherewith *Marriage solemnized* doth abound, whether we respect legitimation of Issue, alteration of property in her Goods, or right of Dower in the Husbands Lands."[1]

Indeed, for the law and custom of betrothal in England, toward the close of the sixteenth century, the quaint and recondite treatise of Swinburne is a mine of information. A vast number of questions illustrative of the principles, the snares and perplexities, of the surviving canonical theories are there taken up and "resolved" with singular brevity and clearness. "Albeit," he says, "this word *Sponsalia* (Englished *Spousals*) being properly understood, doth only signifie Promises of future Marriage, yet is it not perpetually tied to this only Sense, for sometimes it is stretched to the signification of *Love Gifts and Tokens* of the Parties betroathed; as *Bracelets*, *Chains*, *Jewels*, and namely the *Ring;* being often used for the very *Arrabo* or assured Pledge of a perfect Promise: Sometimes it is taken for the *Portion of the Goods* which is given for and in consideration of the Marriage to be Solemnized; and sometimes for the *Feast or Banquet* at the Celebration of the Marriage, and of others it is otherwise used." The canonists, however, distinguish between matrimony and betrothal, and they "do also discern betwixt one kind of Spousals and another, being the first Inventors of the several Names of Spousals *de futuro*, and Spousals *de praesenti*, and yet nevertheless oftentimes they make no difference, or very little, betwixt the Natures and

[1] SWINBURNE, *Of Spousals*, 15. This learned treatise was first published in 1686, although written a century before. See the introductory address "To the Reader."

Effects of Spousals *de praesenti* and of Matrimony solemnized and consummate."[1] Such contracts are "as indissoluble as perfect matrimony;"[2] and "as well the Sacred Scriptures, as the Civil and Ecclesiastical Laws, do usually give to Women betroathed only, or affianced, the Name and Title of *Wife*, because in truth the man and woman, thus perfectly assured, by words of *present time*, are Husband and Wife before God and his Church."[3]

The old perplexity growing out of the coincidence of illegality and validity in the same contract still exists;[4] and the conscience may still be bound by secret marriage, though the court may declare it null and void. The "Law doth forbid all Persons to make *Secret* Contracts of Spousals, or Matrimony; and that justly, considering the manifold discommodities depending thereupon, namely, for that hereby it cometh to pass oftentimes, that the Parties secretly contracting, are otherwise formally affianced, or so near in Blood that they cannot be Married; or being free from those impediments, yet do they alter their purposes, denying and breaking their promises, whence Perjuries" and "many more intolerable mischiefs do succeed."[5] Yet though "Secret Marriages are done indeed against the Law," it is held that once contracted they cannot be dissolved, because public "solemnities are not of the Substance of Spousals, or of Matrimony, but consent only; . . . . So that it may be justly inferred, that the only want of Solemnity doth not hurt the Contract." Moreover, if it be urged that "seeing secret Contracts cannot be proved, it is all one in effect, as

[1] *Ibid.*, 1-3. [2] *Ibid.*, 236.

[3] *Ibid.*, 14. In *Twelfth Night*, Act V, scene i, Olivia calls Cesario "husband;" and in Act IV, scene iii, referring to the future nuptials, speaks of keeping celebration "according to my birth." In *Measure for Measure*, Act I, scene iii, Claudio calls Julietta his "wife;" and in Act IV, scene i, the duke, addressing Mariana who had been *affianced* to Angelo, says, "he is your *husband* on a precontract." *Cf.* DOUCE, *Illustrations of Shakespeare*, I, 114.

[4] SWINBURNE, *op. cit.*, 193 ff. [5] *Ibid.*, 194.

if they were not," it may be answered that such is truly the case "*Jure fori, non jure poli*, Before Man, not before God; for the Church indeed doth not judge of secret and hidden things," but before Almighty God "bare Conscience alone is as a thousand Witnesses; Wherefore I do admonish thee, that hast in truth contracted secret Matrimony, that thou do not marry any other Person; for doubtless this thy pretended Marriage, how lawful soever it may seem in the eye of Man, who judgeth only according to the outward appearance, is nothing but meer Adultery in the infallible sight of God's just Judgment."[1]

Public as opposed to private espousals,[2] according to Swinburne, "are they which are contracted before sufficient Witnesses, and wherein are observed all other Solemnities requisite by the Ecclesiastical Law: For so careful were the ancient Law-makers to avoid those mischiefs, which commonly attend upon *secret* and *clandestine* Contracts, that they would have the same Solemnities observed in contracting Spousals, which be requisite in contracting Matrimony."[3] In fact, according to one authority, "public espousals were, upon pain of excommunication, to be in an open place, and before diverse witnesses;" but it does not "appear to have been necessary to the validity of these contracts, that they should be made at church;"[4] nor can we safely assume that

[1] SWINBURNE, *op. cit.*, 194, 195, 196.

[2] "In an ancient manuscript (No. 1042 in the Archiepiscopal Library at Lambeth Palace) the methods of contracting espousals are thus described: Contrahunt^{a} sponsalia iiij modis—Aliqu^{a} promissione, aliqu^{a} datis arris sponsalitiis interveniente anuli subarrac̃oe, aliqu^{a} interveniente juram̃to. Nuda promissione cum dicit vir, Accipiam te ī meā uxorem, et illa respondet, Accipiā te in meū maritū. Vel alia verba equipollencia, et ista s̄t vera sponsalia q̄ndo sit per v̄ba de futuro cont^{a}huntur."—BURN, *Parish Registers*, 139. On sworn espousals and the other forms see SWINBURNE, *op. cit.*, 213 ff., 193 ff., *passim*.

[3] *Ibid.*, 193.

[4] BURN, *Parish Registers*, 139, citing LYNDWOOD'S *Provinciale*, 271. "In an Almanack for 1665, certain days (January 2, 4, etc.) are pointed out as 'good to marry, or contract a wife (for then women will be fond and loving).'"—*Ibid.*, 139 n. 2. See also WOOD, *The Wedding Day*, 235–60, for an account of the superstitions and folklore on this subject.

this requirement was generally enforced. During the period following the Reformation the celebration of the betrothal and the nuptials usually took place at the same time, on the wedding day in the body of the church; and the form of each is prescribed in the marriage rituals.[1] The public solemnization of espousals was, however, not entirely superseded. In the seventeenth[2] and eighteenth[3] centuries, though passing out of use, the custom was by no means extinct, especially in the case of noble or royal persons. A record of betrothals contracted *in facie ecclesiae* was not usually kept; but at least one such entry has been discovered. The register of Boughton Monchelsea, Kent, shows

[1] Thus in the rituals of Edward VI. and Elizabeth, when the priest says, "Wilt thou have this woman to thy wedded wife?" or "this man to thy wedded husband?" we have the case of espousals. Thereafter, when each party says, "I, N., take thee, N., to my wedded wife" or "husband," we see matrimony contracted, though the form is precisely that of *sponsalia per verba de praesenti*. See the Parker Society *Liturgical Services*, Edward VI., 128, 129; Elizabeth, 218, 219. The same forms are retained in the existing ritual of the English church: BINGHAM, *The Christian Marriage Ceremony*, 163, 164.

[2] In NICHOLS's *Progresses of King James the First* (London, 1828), II, 513 ff., "will be found two accounts (one by Camden) of the ceremonial of the Affiancing of the Princess Elizabeth in 1612. It took place in the Banquetting House at Whitehall, before dinner; Sir Thomas Lake, as Secretary of State, read the words from the book of Common Prayer, in French, 'I Frederick take thee Elizabeth,' etc., after which the Archbishop gave his Benediction: 'The God of Abraham, the God of Isaac, and the God of Jacob, bless these Espousals, and make them prosperous to these Kingdoms, and to his Church.' This appears to have been the whole of the office, and the service was probably not longer in ordinary cases. In the Contract for the Princess's marriage, executed the same day (Dec. 27), is a clause, 'Quòd Matrimonium verum et legitimum contrahatur inter eos in Angliā ante initium mensis Maii, et interim *Sponsalia legitima de praesenti.*' 'It would be no difficulty,' remarks Mr. Anstis, Garter [Leland's *Collectanea*, V. 329–36], 'to show the antient custom of such Espousals by the daughter of the Crown of England as distinct acts from the office of Matrimony, and that they frequently were performed some months or years before the marriage was actually celebrated.'"—BURN, *Parish Registers*, 140 n. 2. As shown in the case of Princess Elizabeth, even the banns followed the public betrothal: NICHOLS, II, 524, 525. In the fifth year of Henry V., the espousals of Thomas Thorp and Katerina Burgate were publicly celebrated: NAPIER'S *Swincombe*, 65; BURN, *op. cit.*, 144. "We find, under date 1476, that a certificate was given by the minister and six parishioners of Ufford, in Suffolk, to the effect that since the death of a certain man's wife he had not been 'trowhplyht' to any woman, and that he might therefore lawfully take a wife."—WOOD, *The Wedding Day*, 212.

[3] In a breach of promise suit before the common pleas, 1747, the plaintiff proved that she had been publicly betrothed, and received £7,000 damage: *Gentleman's Magazine*, 1747, p. 293; also *Gent. Mag. Library: Manners and Customs*, 54.

that on the tenth day of January, 1630, William Maddox and Elizabeth Grimestone were affianced "in due form of law;" and in this case the marriage was not celebrated until three years later.[1] "The form of betrothing at church" in England "has not been handed to us in any of its ancient ecclesiastical service books;" but it "has been preserved in a few of the French and Italian rituals."[2] "The ceremony, generally speaking, was performed by the priest demanding of the parties if they had entered into a contract with any other person, or made a vow of chastity or religion; whether they had acted for each other, or for any child they might have had, in the capacity of godfather or godmother." Then, if the contract were in the form of *sponsalia jurata* or sworn espousals, the "oath was administered. 'You swear by God and his holy Saints herein and by all the Saints of Paradise, that you will take this woman whose name is N., to wife within forty days, if holy church will permit.' The priest then joined their hands, and said—'And thus you affiance yourselves;' to which the parties answered,—'Yes, Sir.' They then received a suitable exhortation on the nature and design of marriage, and an injunction to live piously and chastily until that event should take place. They were not permitted, at least by the church, to reside in the same house, but were nevertheless regarded as man and wife independently of the usual privileges."[3] Later in France

[1] BURN, *op. cit.*, 144. The author has evidently transposed the dates. "The Eastern Emperor Leo, surnamed Philosophus (in order to prevent the mischiefs arising from Espousals to be concluded by marriage at a distant period) commanded that the Espousals and Weddings should be performed both upon one day. Alexius Comnenus endeavoured to restore the old custom."—*Alex. Com. Novel. de Spons.*, 1, 2.: BURN, *loc. cit.*, n. 1.

[2] DOUCE, *Illustrations of Shakespeare* (London, 1807), I, 108. Douce discusses the more interesting references to the betrothal in Shakespeare's plays: *ibid.*, 107–14, 403. *Cf.* also BURN, *op. cit.*, 140, 143. On the mediæval English practice of spousals, private and in church, see PALMER, *Origines liturgicae*, II, 211, 212; and in general JEAFFRESON, *Brides and Bridals*, I, 60–87; BRAND, *Popular Antiquities*, II, 87 ff.

[3] DOUCE, *op. cit.*, I, 113, 114. See also WOOD, *The Wedding Day*, 211, 212; and compare the Greek betrothal ritual in BURN, *op. cit.*, 141, 142, taken from the *Euchologion sive rituale graecorum*, 380. On *sponsalia jurata* see SWINBURNE, *Of Spousals*, 213–21; KLING, *Tr. mat. causarum*, 2, 3; BEUST, *Tr. de spons. et mat.*, 219 ff.

espousals in church were often prohibited, "because instances frequently occurred when the parties, relying on the testimony of the priest, scrupled not to live together as man and wife. . . . . Excesses were likewise often committed by the celebration of Espousals in taverns and ale-houses, and some of the synodal decrees expressly injoin that the parties shall not get drunk on these occasions."[1]

Valid betrothals, like valid marriages, may be celebrated by signs as well as words. This is true, says Swinburne, notwithstanding "a ready text, extant in the bowels of the law," much relied upon by diverse writers, to the effect that words expressive of consent are essential.[2] "And forasmuch as *Subarration*, that is the giving and receiving of a *Ring*, is a Sign of all others, most usual in Spousals and Matrimonial Contracts, I think it requisite to speak of it, before all other Signs; the rather because the Writers upon this Sign have diligently described unto us, what Persons did first devise the same, and to what end; and what was the matter, and what the form thereof, on which Finger it ought to be worn, and what is the Signification of each of those Circumstances, with divers other Observations which I will briefly run over. The first Inventer of the Ring (as is reported) was one *Prometheus;* The Workman which made it was *Tubal-Cain*, of whom there is mention in the fourth of Genesis, that he wrought cunningly in every Craft of Brass and Iron: And *Tubal-Cain* by the Counsel of our first Parent *Adam* (as my Author telleth me), gave it unto his Son to this end, that therewith he should espouse a Wife, like as *Abraham* delivered unto his Servant Bracelets and Ear-Rings of Gold, which he gave to *Rebecca*, when he chose her to be *Isaacks* Wife. . . . . But the first Ring

[1] DOUCE, *op. cit.*, I, 112, 113. Compare the interesting passage in BULLINGER, *Der christlich Ehestand*, lvs. 60 ff.

[2] SWINBURNE, *Of Spousals*, 203 ff. Whether the ring alone, without the usual words of assent, is a sufficient sign of contracting espousals or marriage, depends on its presentation in solemn form or upon local or national custom: *ibid.*, 209–12.

was not of Gold, but of Iron, adorned with an Adamant, the Metal hard and durable, signifying the continuance and perpetuity of the Contract; the vertuous Adamant drawing the Iron unto it, signifying the perfect unity and indissoluble Conjunction of their minds, in true and faithful love; Howbeit it skilleth not at this day, what Metal the Ring be; The form of the Ring being circular, that is, round, and without end, importeth thus much, that their mutual love and hearty affection should roundly flow from the one to the other, as in a Circle, and that continually, and for ever; The Finger on which this Ring is to be worn is the fourth Finger of the left hand, next unto the little Finger; because by the received Opinion of the Learned and Experienced in Ripping up, and anatomizing Mens Bodies, there is a Vein of Blood which passeth from that fourth Finger unto the Heart, called *Vena amoris*, Love's Vein. And so the wearing of the Ring on that Finger signifieth, that the love should not be vain or fained, but that as they did give their Hands each to other, so likewise they should give their Hearts also, whereunto that Vein is extended. Furthermore I do observe, that in former Ages it was not tolerated to single or unmarried Persons to wear Rings, unless they were Judges, Doctors, or Senators, or such like honourable Persons: So that being destitute of such Dignity, it was a note of Vanity, Lasciviousness, and Pride for them to presume to wear a Ring, whereby we may collect how greatly they did honour and reverence the Sacred Estate of Wedlock in times past, in permitting the Parties affianced to be adorned with the honourable Ornament of the Ring: As also the Vanity, Lasciviousness, and intolerable Pride of these our days, wherein every skipping Jack and every flirting Jill, must not only be ring'd (forsooth) very daintily, but must have some special Jewel or Favour besides, as though they were descended of some noble House or Parent-

age, when as all their Houses and whole Patrimony is not worth the Ninth part of a Noble; or else, as if they were betrothed or assured in the holy Band of Wedlock, when as indeed, there is no manner of Contract betwixt them, unless peradventure it be such a Contract as *Judah* made with *Thamar*, ... which bargain he concluded by delivering her a Ring."[1]

This curious passage is here quoted at length, not because it has historical value, but because the author has condensed therein the symbolism, conceits, and folklore connected with the betrothal ring as these are found in the writings of the canonists, whom he carefully and minutely cites in the margin.[2]

Before the act of 1753 persons contracting espousals *de praesenti* might be compelled to celebrate matrimony *in facie ecclesiae*, under penalty for refusal of excommunication by the spiritual and imprisonment by the secular power;[3] but in case of a mere contract *de futuro*, if either party refused to keep his engagement, he was rather to be "admonished than compelled." The "judge is not to proceed

[1] SWINBURNE, *op. cit.*, 207-9. The symbolism of the ring is explained in the same spirit by MARTIN BUCER, *Script. Anglic.* (Basel, 1577), *Censur. in ordinat. eccles.*, cap. xx, pp. 488, 489: WHITGIFT, "Defence of the Answer," *Works*, III, 353 n. 11. (*Cf.* chap. xi, below, where this passage is quoted.) The early rituals, as we have seen (above, chap. vii, sec. 1), quote the Decree of Gratian as authority for the "vein extending to the heart."

[2] On the archæology of the ring see further SAXSE, *Arcana annuli pronubii*, 68 ff.; WOOD, *The Wedding Day*, 217-34; WHEATLEY, *Illustrations of the Common Prayer*, 437-40; BRAND, *Popular Antiquities*, II, 102 ff.; DOUCE, *Illustrations of Shakespeare*, I, 109 ff.; JEAFFRESON, *Brides and Bridals*, I, 138-66; *Gentleman's Magazine*, 1795, pp. 727, 728, 987; also *Gent. Mag. Library: Manners and Customs*, 54-57; *Notes and Queries*, 3d series, VII, 12, 307, 350, 387 (metal of the ring); 5th series, XII, 407, 474, 514. The fourth finger in connection with the vein to the heart is mentioned by AULUS GELLIUS, lib. x, c. 10; also by MACROBIUS, *Saturnal.*, lib. vii, c. 13, who "quotes the opinion of Ateius Capito, that the right hand was exempt from this office because it was much more useful than the left hand, and therefore the precious stones of the rings were liable to be broken; and that the finger of the left hand was selected which was the least used."—*Gent. Mag. Lib.*, *loc. cit.*, 54. The mediæval marriage ceremony is described by CHAUCER, *Merchant's Tale*, ll. 450-509 (ed. Morris, London, 1891), 332-333.

[3] *Cf.* 2 and 3 Ed. VI., c. 23, cited above; and HOOPER, *Later Writings*, II, 138.

to the *Significavit*, but rather to absolve that cursed Party which contemneth the Censures of the Church, albeit there be no Cause of favour, but fear of further mischief, by compelling them to go together, which hate one another. Yet is not this froward Party thus to be dismissed, but is to suffer pennance" for breach of faith.[1]

II. AS TO THE NATURE OF MARRIAGE

In its practical results, therefore, the Reformation had little effect on law and theory as to the *form* of wedlock. For England it had no significance at all; and the same is true of Germany, except so far as Luther's view of the *sponsalia* may have found some expression in legislation and judicial decree. With respect to the *nature* of marriage the case is very different. The dogma of its sacramental character was abandoned throughout the Protestant world.[2] In its place a new conception arose; and it is very instructive to trace the process of change in the mind of Luther himself.[3] As late as 1519 he declares that "the marriage state is a sacrament," an outward "symbol of the greatest, holiest, noblest, most worthy thing that has ever existed or can exist: the union of the divine and human natures in Christ;"[4] and this symbol he explains entirely in harmony with the "dogmatism of the Middle Ages, notably that of St. Thomas Aquinas, who sought the motive of the marriage sacrament in legalization of the sensual impulse."[5] In the very next year, however, and again in 1539, he expresses

[1] SWINBURNE, *op. cit.*, 231, 232; BURN, *op. cit.*, 138, 139, 140.

[2] In general on the Protestant theory of marriage see FRIEDBERG, *Geschichte der Civilehe*, 6 ff.; *idem*, *Eheschliessung*, 153–98; RICHTER, *Lehrbuch*, 1050 ff.

[3] The selections from Luther's writings relating to the nature of marriage and the question of its sacramental character take up the first 215 pages of STRAMPFF'S *Dr. Martin Luther: Ueber die Ehe.*

[4] LUTHER, "Vom ehelichen Stande," *Bücher und Schriften* (Jena, 1564), I, fol. 170*b*; also in STRAMPFF, 205.

[5] FRIEDBERG, *Eheschliessung*, 157.

himself decisively against the ancient Catholic doctrine.[1] Nevertheless in his various attempts to define the matrimonial state an apparent contradiction is presented which is hard to reconcile, and which is of great significance in the long struggle for the instituting of civil marriage. On the one hand, though not technically a sacrament, marriage is described as holy, a "most spiritual" status, "ordained and founded" by God himself. It is the source of domestic and public government, the foundation of human society, which without it would "fall to pieces."[2] So holy is the state of matrimony, in Luther's conception, that he must perforce still use the term "sacrament" to convey his meaning.[3] On the other hand, his writings contain passages of a very different tenor. "So many lands, so many customs, runs the common saying. Therefore since weddings and matrimony are a temporal business, it becomes us clerks and servants of the church to order or rule nothing therein, but to leave to each city and state its own usages and customs in this regard."[4] Elsewhere, in words which anticipate the sentiment of Milton by a hundred years, he insists that "matrimonial questions do not touch the conscience, but

[1] LUTHER, *Von der Babylonischen gefencknuss der Kirchen; idem, Von den Conciliis und Kirchen* (1539): quoted by FRIEDBERG, *op. cit.*, 157, 158, notes. These passages and others in STRAMPFF, 205 ff., 213 ff.

[2] LUTHER, "Das siebend Capitel St. Paul zu den Corinthern ausgelegt" (1523), *Bücher und Schriften* (Jena, 1555), II, fol. 297; *idem*, "Auslegung des ersten Buch Moses" (1536–45), *ibid.* (Jena, 1556), IV; or STRAMPFF, 163–203. See the passage quoted by FRIEDBERG, *Eheschliessung*, 158. For similar expressions compare *Tischreden*, foll. 350, 352, etc.

[3] LUTHER, "Auslegung des ersten Buch Moses" (1536–45), *loc. cit.*, fol. 145*a*. *Cf.* FRIEDBERG, *op. cit.*, 157.

[4] "So manchs Land, so manch Sitte, sagt das gemeine Sprüchwort; demnach, weil die Hochzeit und Ehestand ein weltlich Geschäft ist, gebührt uns Geistlichen oder Kirchendienern nichts darin zu ordenen oder regieren, sondern lassen einer iglichen Stadt und Land hierin ihren Brauch und Gewohnheit, wie sie gehen."—LUTHER, "Der kleine Katechismus mit dem Traubüchlein, Vorrede" (1529), in STRAMPFF, 340, 341, 422. Again LUTHER says: "Es kan ja niemand leugnen, das die Ehe ein eusserlich weltlich ding ist, wie Kleider und Speise, Haus und Hofe, weltlicher Oberkeit unterworffen."—"Von Ehesachen," *Bücher und Schriften* (1561), V, fol. 237.

belong to the temporal power," warning the clergy not to meddle with them unless commanded by that authority.[1] Marriage, he emphatically declares, is a "temporal, worldly thing" which "does not concern the church."[2]

Thus Luther provided the arsenal from which both the friends and the foes of civil marriage drew their weapons. His name, says Friedberg, became the "battle-cry," the "shield and mantle," of the contending factions; and while urging that Luther must be regarded as the champion of marriage as a "worldly thing," the same writer points out the two powerful motives which may in large measure account for this apparent contradiction.[3] First, the evils growing out of the ecclesiastical jurisdiction in matrimonial causes were becoming an intolerable burden to Christendom; and only by denying the sacramental nature of marriage could the way be cleared for a transfer of that jurisdiction to the secular courts. Secondly, the abuses connected with sacerdotal celibacy were scarcely less threatening. The licentiousness of the clergy was "beyond belief." Many "bishops were at last content to convert the vows of celibacy into sources of revenue, suffering the clergy to live in concubinage in return for a yearly tax;[4] and yet the "ill

[1] Ehesachen gehen die Gewissen nicht an, sondern gehören für die weltliche Oberkeit; darumb schlage sich keiner drein, die Oberkeit befehl es denn, sprach D. M. L. zu den Predigern."—*Tischreden*, fol. 369. In another passage, speaking of the breach of the marriage vow and divorce, he says: "Solche fälle gehören eigentlich der Oberkeit; denn die Ehe ist ein weltlich ding, mit allen iren umbstenden; gehet die Kirch nichts an, denn so viel es die Gewissen belanget."—*Ibid.*, fol. 368. *Cf.* FRIEDBERG, *Eheschliessung*, 160.

[2] LUTHER, *Tischreden*, fol. 369. See the passages relating to the "weltliche Regiment in Ehesachen," in STRAMPFF, 411–30, with the author's critical essay.

[3] FRIEDBERG, *op. cit.*, 160–75.

[4] *Ibid.*, 166. See TYNDALE, *Answer to More*, 29 n. 4: "More saith in his *Conf.* (p. ccliiii), 'Syth the marriage (of a priest) is no marriage, it is but whoredom itself. And I am sure also that it defileth the priest more than double and treble whoredom.'" Tyndale accuses the pope of opposing God's law in denying marriage to priests and by dispensations licensing concubinage for money, "as through Dutchland every priest, paying a gildren unto the archdeacon, shall freely and quietly have his whore . . . , as they do in Wales, in Ireland, Scotland, France, and Spain;" and in "England, thereto, they be not few which have" such licenses. When

preserved chastity of the priesthood was interpenetrated then as before by a profound contempt for the marriage state."[1] Hence Luther proclaimed the natural and scriptural right of priests to marry; and rejecting the low ascetic ideal he laid stress on the purity and holiness of marriage as an institution ordained of heaven.[2] But, after all, this doctrine is not so entirely out of harmony with the view that matrimony is a "worldly thing;" for with the Reformation a new conception of the temporal power arose. During the Middle Ages the contrast was not between church and state, as the latter is now understood; but between the "unholy world and the holy church." Hence the state, because it was comprehended under the conception of the world, "partook of its unholiness. The Reformation formulated the antithesis differently. It released the state from its shell of 'worldliness,' ascribed to it ethical tendencies, and made it the bearer of morality. Formerly the state was unholy, because it belonged to the world; now the world became ethical, because it fell within the sphere of the state, for the state itself was moral."[3] Thus, in the sixteenth century, the conception of the "Christian state" and of the "Christian

the parishes go to law to make them put away their concubines, "the bishop's officers mock them, poll them, and make them spend their thrifts and the priests keep their whores still."—*Ibid.*, 40, 41 n. 4, and the documents there quoted. *Cf.* COVERDALE, *Remains*, 484; TYNDALE, *Doc. Treatise*, 232; HUTCHINSON, *Works*, 202; and especially JEWELL'S controversy with Harding in "Defence of the Apology," *Works*, IV, 629 ff., 640 ff. On the prevalence of concubinage in England during the Middle Ages see STUBBS, *Const. Hist.*, III, 372; MAKOWER, *Const. Hist. Eng. Church*, 217–20, notes, who declares that from the close of the twelfth century onward a priest was punished less severely for fornication than for marrying. "Loss of office is the penalty only for a breach of the prohibition to marry," not for fornication, unless very notorious: *op. cit.*, 217. Compare JOHNSON, *Canons*, II, 26, 33, 40, 80, 81, 114, 132; and 2 and 3 Ed. VI.: GEE AND HARDY, *Documents*, 367, for complaints of this evil. See the literature on the evils of celibacy cited in chap. viii.

[1] FRIEDBERG, *Eheschliessung*, 166. For Germany compare KAWERAU, *Die Reformation und die Ehe*, 1–40.

[2] LUTHER, "Bedenken und Unterricht von den Klöstern" (1522), *Kleinere Schriften*, II, 45–73; *idem*, *An die herrn deutschs Ordens* (1523); and BUGENHAGEN, *De conjugio episcoporum et diaconorum* (1525).

[3] FRIEDBERG, *op. cit.*, 175.

prince," to which Erasmus gave such fine expression, became thoroughly established.[1] Theoretically church and state were kept apart; but practically they were united; for the idea of a "state church" no longer gave a shock to the religious sense. Accordingly the king as the Lord's anointed became the defender of the faith and the source of ecclesiastical authority.

With Luther's teachings regarding the nature of marriage the German Protestant leaders were mainly agreed.[2] In his reaction against celibacy and asceticism, however, he went to an extreme where all could not follow him. There were doubtless many persons attached to the new doctrines who were inclined to tolerate or sanction concubinage and even polygamy.[3] But the "double marriage" of the landgrave of Hesse, which was sanctioned by Luther, Melanchthon, and Bucer, created a scandal for which the majority were not willing to be held responsible. Indeed, from the tone of the decision of Luther and his colleagues it seems clear that they were conscious of treading on dangerous ground.[4] Regarding another important point the Reformers were not entirely in harmony. The abuses arising in the complex law relating to forbidden degrees and the other canonical impediments, it was felt, ought to be remedied. But there was much divergence of opinion as to the "exact content of the reform needed and even as to the principle which ought

[1] FRIEDBERG, *Eheschliessung*, 173, 175. He finds traces of the idea of a Christian state in the writings of Huss and Tauler: *ibid.*, 173 n. 8.

[2] For example see BULLINGER, *Der christ. Ehestand*, lvs. 3 ff.; MELANCHTHON, "De conjugio," *Opera*, I, pars ii, 221, 222; MENTZER, *De conjugio tr.*, 1 ff.; FORSTER, *De nuptiis*, 1 ff.; SARCERIUS, *Vom heil. Ehestande*, foll. 1-12; *idem*, *Corpus juris mat.*, foll. 1-11. Compare the sentiments of ERASMUS, *De matrimonio christiano*, 2 ff., *passim*.

[3] RICHTER, *Beiträge zur Gesch. des Ehescheidungsrechts*, 46 ff.; FORSTER, *De nuptiis*, 44.

[4] See the "Bedencken" and the other documents in the case in ARCUARIUS, *Betrachtung*, 210 ff., 220 ff. Consult GOTTLIEB WARMUND (JOHANN LYSER?), *Gewissenhaffte Gedancken vom Ehestande*, first six pages; and the literature mentioned in Bibliographical Note IX.

to be followed. Should simply a return be made to the Mosaic or to the Roman law?" Or should the canon law be retained with certain modifications?[1] All were agreed that the hindrance of spiritual kinship must be absolutely adandoned; and there was a tendency to allow intermarriage within the third degree of affinity and consanguinity.[2] But there was much diversity in legislation and judicial practice, the rules of the Levitical code being followed with varied interpretations.[3] By the old Protestant law and doctrine, as well as by the rule of the mother church, *disparitas cultus*, or difference of religious faith, was regarded as an impediment to wedlock. Marriages between Christians and non-Christians were positively forbidden.[4] In like spirit, unions between adherents of different Christian confessions were either entirely prohibited or else

[1] SCHEUERL, "Zur Lehre von dem Ehehindernisse der Verwandtschaft," *ZKR.*, XVI, 1-34, giving a clear account of the Protestant doctrine and its relation to the canon law. Compare his *Das gemeine deutsche Eherecht*, 183 ff., 195 ff.

For Luther's views on impediments, including the forbidden degrees, consult the collection of writings in STRAMPFF, 215 ff., 228 ff.; and compare ERASMUS, *De mat. christ.*, 94 ff., 100 ff.; MELANCHTHON, "De conjugio," *Opera*, I, pars ii, 223 ff.; *idem*, "De arbore consang.," in SARCERIUS, *Vom heil. Ehestande*, foll. 12 ff.; BULLINGER, *Der christ. Ehestand*, lvs. 16 ff.; or the same in SARCERIUS, *op. cit.*, foll. 44 ff.; SCHNEIDEWIN, *De nuptiis*, tit. x, "De arbore affinitas," secs. 1-23; BEUST, *Tr. de spons. et mat.*, 23, 24, 225 ff.; KLING, *Tr. mat. caus.*, 43-58; BIDEMBACH, *De causis mat. tr.*, 37 ff.; MENTZER, *De conjugio tr.*, 60 ff., 70 ff.; BROUWER, *De jure connub.*, 435 ff., 444 ff., 461 ff.

[2] See the Dresden resolutions of 1653 in SCHLEUSNER, "Zu den Anfängen protest. Eherechts," *ZKG.*, VI, 411, 412; also in MEJER, "Zur Gesch. des ält. protest. Eherechts," *ZKR.*, XVI, 36, 37; *idem*, *Zum Kirchenrecht*, 147-71.

[3] RICHTER, *Lehrbuch*, 1089; FRIEDBERG, *Lehrbuch*, 296-336; *idem*, "Beiträge zur Geschichte des brand.-preuss. Eherechts," *ZKR.*, VI, 90-135, particularly 129 ff.; *idem*, "Aus der protest. Eherechtspflege des 16. Jahrh.," *ibid.*, IV, 304-49, discussing the case of Zaschwitz and communicating important documents of Melanchthon which disclose his liberal views regarding affinity. The church ordinances regarding impediments are analyzed by GOESCHEN, *Doctrina de mat.*, 9 ff., 30 ff. Compare his article "Ehe," in HERZOG'S *Encyclopaedie*, III, 674-80.

[4] Luther, however, was more tolerant, refusing to accept difference of religion as a proper hindrance to marriage: see the passages collected by STRAMPFF, 282, 283. On the other hand, MELANCHTHON, "De conjugio," *Opera*, I, pars ii, 235, 236, disapproved of such unions. Compare ERASMUS, *De mat. christ.*, 108, 109. The law was gradually relaxed, especially in favor of intermarriage with Jews, and it is now abrogated under the imperial legislation: RICHTER, *Lehrbuch*, 1110, 1111; SCHEUERL, *Das gemeine deutsche Eherecht*, 218, 219; *idem*, *Kirchenrecht. Abhandlungen*, 521; FRIEDBERG AND WASSERSCHLEBEN, "Zwei Gutachten," *ZKG.*, IX.

severely discouraged.[1] Such intolerance was sure to produce the natural bitter fruit; and the controversy over these "mixed marriages" has perpetuated itself to our own times.[2]

In England as well as in Germany the law and judicature of the church rested on the sanction of the state.[3] This is the fundamental fact in the history of the English revolt from Rome. But, owing to the peculiar circumstances of that revolt, the investiture of the king with the headship of the church was very unfortunate. Henry VIII. clung to the old doctrines. A stumbling-block was thus placed in the way of intellectual and spiritual progress which in the end cost a second revolution to remove. The effects of this unlucky settlement are plainly discernible in the ecclesiastical conception of marriage. If the teachings of the fathers of the English church[4] be examined for the period between

[1] Thus, according to *Des Herzogthums Wirtemberg erneuerte Ehe- und Ehe-Gerichts-Ordnung* (1687), 96–99, mixed marriages are not absolutely prohibited; but the parties are to be "dehortirt;" the peril to their souls is to be pointed out; a special order procured for the nuptials; while the evangelical party is to be admonished to have the marriage celebrated in some evangelical place abroad, to frequent the orthodox services and sacraments, and to have the future children brought up in the orthodox religion.

[2] SCHEURL, *Das gemeine deutsche Eherecht*, 219–21; RICHTER, *Lehrbuch*, 1201 ff., 1207 ff., especially nn. 28, 30, 32, 45; SCHOTT, *Einleit. in das Eherecht*, 123, 124.

In general for the controversy regarding mixed marriages see the literature described in Bibliographical Note IX.

[3] In Germany, at the Reformation, matrimonial jurisdiction fell partly into the hands of the parish clergy, partly into the hands of secular judges. The former in their decisions followed mainly the Roman law and the scriptural teachings under the guidance of Luther and other great theologians; while the lay judges were guided by the *corpus juris canonici*. Confusion arose; the law was carelessly and ignorantly administered; and so a demand was made for special courts for matrimonial questions. This resulted, generally, in the relegation of matrimonial causes to the newly created consistories, composed partly of spiritual and partly of temporal judges, who in practice followed the principles of the canon law and constituted in fact ecclesiastical courts. Compare the very interesting decisions of the consistory court of Wittenberg, already quoted, beginning soon after its formation, in SCHLEUSNER, *Anfänge des prot. Eherechts*, 130–62. It can scarcely be said that the evils of matrimonial law and administration in Germany were very much lessened as a result of the Reformation during the first two centuries after Luther. See the minute investigation of FRIEDBERG, *Eheschliessung*, 177 ff., 186 ff.; and his *Geschichte der Civilehe*. Compare the discussion of the rise of matrimonial jurisdiction in chap. xi.

[4] See the *Works of the Fathers and Early Writers of the Reformed English Church*, published by the Parker Society in a long series of volumes. There is an excellent index, six columns of which are devoted to "marriage."

the death of Wolsey and the death of Elizabeth, it will be found that they are less bold, showing more of the spirit of compromise with the mediæval doctrines, than are those of Luther and his immediate followers on the continent. Not a single clear voice, apparently, is raised for civil marriage. Technically matrimony as a sacrament is rejected by all,[1] though its sacramental nature was first definitely denied by the church in the Thirty-nine Articles of 1552.[2] It is, however, something more than a mere civil status. It is, declares Fulke, "nothing else but a devilish slander to say that we 'esteem it but in respect of the flesh, or for a civil contract.'"[3] Tyndale calls matrimony "a similitude of the kingdom of heaven;"[4] and in general it is held to be a holy institution, "ordained by God himself in Paradise."[5] It represents the union of Christ and the church;[6] and it is "pure," "dignified," and "honorable" for all men.[7] Hence the natural and scriptural right of priests to marry is vindicated;[8] and, fol-

[1] Matrimony is no sacrament, except in the general sense of "mystery": CRANMER, *Misc. Writings*, 115, 116; TYNDALE, *Doctrinal Treatises*, I, 254; *idem*, *Answer to More*, 175; CALFHILL, *An Answer to John Martiall's Treatise of the Cross*, 235 ff.; ROGERS, *The Catholic Doc. of the Church of England, an Exposition of the Thirty-Nine Articles*, 260 ff.; FULKE, *Answer*, 229, 243; *idem*, *Defence against Gregory Martin*, 168, 492-96; JEWELL, *Works*, II, 1125; WHITAKER, *Disputation on Holy Scripture against the Papists*, 197, 489.

[2] FRIEDBERG, *Eheschliessung*, 309 n. 1. "Henry the VIII. stood so far upon the ground of the canonical doctrine that before and after his breach with Leo X. he declared marriage to be a sacrament."—*Ibid.*

[3] FULKE, *Defence against Gregory Martin*, 492.

[4] TYNDALE, *Answer to More*, 175.

[5] JEWELL, *Works*, II, 1128; LATIMER, *Sermons and Remains*, 161, 162; HUTCHINSON, *Works*, 148; BECON, *Prayers*, 27, 611; BULLINGER, *Decades*, I, 394, 397; BRADFORD, *Writings*, I, 167; TYNDALE, *Doctrinal Treatises*, 254.

[6] BULLINGER, *Decades*, I, 397; PHILPOT, *Examinations and Writings*, 246; SANDYS, *Sermons*, 317, 313-30 (marriage in general); TYNDALE, *Doc. Treatises*, 254; *idem*, *Answer to More*, 153, 154.

[7] CALFHILL, *Answer*, 238-41; BULLINGER, *Decades*, I, 394, 396; HOOPER, *Early Writings*, 375; *idem*, *Later Writings*, 55; JEWELL, *Works*, I, 158; II, 1128; IV, 803; LATIMER, *Sermons*, I, 366, 393; *idem*, *Sermons and Remains*, 160, 162; SANDYS, *Sermons*, 313, 314; TYNDALE, *Expositions*, 125.

[8] Authorized by 2 and 3 Ed. VI., c. 21, 1549, which was confirmed in 1552: CRANMER, *Misc. Writings*, p. x; LATIMER, *Sermons*, 529 n. 3; *Zürich Letters*, II, 159; *Statutes at Large*, II, 283, 305, 306.

lowing St. Paul, the forbidding of them to marry is called a "doctrine of devils."[1]

Still the new teaching did not at once find expression in the law of the land. Under its influence, at the beginning of the Reformation, some of the clergy, notably Archbishop Cranmer, married; but Henry VIII. tenaciously clung to the doctrine of clerical celibacy and issued several proclamations against the marriage of priests.[2] Thus in 1535 "his majestie understanding that a few number of this his realme being priests, as well religious as other, have taken wives, and married themselves," and not wishing the "generalitie of the clergy" to follow their example, doth command all such priests "as have attempted marriages" or shall "hereafter presumptuously proceed in the same, that they nor any of them shall minister any sacrament or other ministry mysticall, nor have any office, dignity, cure, privilege, profitt or commoditye heretofore accustomed, and belonging to the clergie of this realme, but shall utterly after such marriages be expelled and deprived from the same, and be had and reputed as lay persons, to all purposes and intents. And that such as shall after this proclamation . . . . take wives, and be married, shall run in his grace's indignation, and suffer further punishment and imprisonment at his grace's will and pleasure."[3] Proclamations[4] of like nature were later enacted; and finally the six-articles law of 1539 pro-

[1] LATIMER, *Sermons and Remains*, 77, 162; HOOPER, *Early Writings*, 375; *idem*, *Later Writings*, 55, 56, 126; BULLINGER, *Decades*, IV, 509. *Cf.* ROGERS, *Thirty-Nine Articles*, 302–7; BECON, *Prayers*, 235 ff.; COVERDALE, *Remains*, 483–85; PILKINGTON, *Works*, 564; TYNDALE, *Expositions*, 29, 151, 155, 156; *idem*, *Doc. Treatises*, 230; JEWELL, *Works*, II, 882; III, 406; CRANMER, *Misc. Writings*, 393 n. 5, also pp. viii, x. For many other references see the Index to the Parker Society *Publications*, at "Marriage of Clergy."

[2] MAKOWER, *Const. Hist. Eng. Church*, 220–24, gives an excellent discussion, with quotations from the sources, of the laws relating to the marriage of priests from Henry VIII. to James I.

[3] WILKINS, *Concilia*, I, 776. Compare MAKOWER, *op. cit.*, 220 n. 17.

[4] There were "similar proclamations of 16th November, 1538 (Strype, *Cranmer*, ed. 1812, I, 98) and of 1539 (Wilkins, III, 847). The proclamations had the force of law, as can be seen from 31 Hen. VIII. (1539), c. 8."—MAKOWER, *op. cit.*, 221, note. *Cf. Statutes at Large*, II, 143.

vided that all marriages or matrimonial contracts, made by priests or between a man and a woman either of whom has vowed chastity, before or during "this present parliament," shall "be utterly void and of none effect;" while any future transgression is to be punished as felony.[1] Nevertheless Cranmer was allowed to retain his wife; and through his influence the penalties prescribed by the six-articles act were somewhat modified in 1540.[2]

Under Edward VI. the doctrine of the Reformation gained a victory. The six-articles law was repealed in 1547.[3] In the same year the lower house of convocation prayed "that all provisions against clerical marriages might be set aside and all vows of chastity pronounced void."[4] Accordingly by 2 and 3 Edward VI. (1548), c. 21, the obstacles to such unions were formally swept away on grounds of expediency; though the act sanctions the ancient prejudice by declaring that "it were not only better for the estimation of priests, and other ministers in the Church of God, to live chaste, sole, and separate from the company of women and the bond of marriage, but also thereby they might the better intend to the administration of the gospel, and be less intricated and troubled with the charge of household, being free and unburdened from the care and cost of finding wife and children, and that it were most to be wished that they would willingly endeavour themselves to a perpetual chastity."[5]

[1] This statute (31 Hen. VIII., c. 14) may be found in GEE AND HARDY, *Documents*, 303-19; an abstract in MAKOWER, *op. cit.*, 221 n. 19; and a summary in *Statutes at Large*, II, 149. Compare the comments on the act as showing matrimony "to have been a more grievous offence than concubinage," in *New Monthly Review*, XXIX (1763), 270.

[2] By 32 Hen. VIII., c. x: MAKOWER, *op. cit.*, 221 n. 20.

[3] By 1 Ed. VI., c. 12 (1547): *Statutes at Large*, II, 256.

[4] MAKOWER, *op. cit.*, 222; *ap.* WILKINS, *Concilia*, IV, 16. *Cf.* GEE AND HARDY, *Documents*, 366.

[5] *Ibid.*, 367: *Statutes at Large*, II, 283. On the debates and controversial writings connected with this act see BURNET, *Hist. of Reformation*, I, 354-58. By the Injunctions of 1548, in the visitations inquiry is to be made whether any "do condemn married priests, and for that they be married will not receive the communion or other sacraments at their hands."—CARDWELL, *Doc. Annals*, I, 51.

This clause was explained by the act of 5 and 6 Edward VI. (1551–52), c. 12, "as meaning not simply that the marriages in question were exempt from punishment, but that they were good and lawful marriages, the offspring of which were legitimate and could inherit in the usual way, and that priests might be tenants by courtesy on the death of their wives, and wives endowable of their lands."[1]

After the accession of Mary, a royal ordinance again prescribed celibacy as the condition of holding priestly office.[2] The matrimonial laws of Edward's reign were repealed;[3] and it is significant of Elizabeth's conservative position on religious questions that those enactments were not restored on her coming to power. She was shocked at the marriage of priests and was very reluctant to sanction it by statute. "The Queen's majesty," writes Sandys to Parker in 1559, "will wink at it but not stablish it by law, which is nothing else but to bastard our children;"[4] and two years later, according to Cecil, "her majesty continueth very evil affected to the state of matrimony in the clergy. And if [I] were not therein very stiff," she "would utterly and openly condemn and forbid it."[5] Yet already by her first Injunctions,

[1] Summary of the statute by MAKOWER, *op. cit.*, 222. *Cf. Statutes at Large*, II, 305; BURNET, *Hist. of Reformation*, I, 432.

[2] See the "Articles of Queen Mary, 4th March, 1553," in CARDWELL, *Doc. Ann.*, I, 112, 113; also MAKOWER, *op. cit.*, 222 n. 26. Such married priests, "after deprivation of their benefice, or ecclesiastical promotion," are to "be also divorced every one from his said woman, and due punishment otherwise taken for the offence therein." But the bishops are to "use more lenity and clemency with such as have married, whose wives be dead, than with others whose women do yet remain alive;" as also with those who, with their wife's consent, in the bishop's presence, promise to "abstain." *Cf.* BURNET, *Hist. of Reformation*, I, 490, who says "many were set to write against the marriage of the clergy."

[3] See 1 Mary, stat. 2, c. 2, 1553: GEE AND HARDY, *Documents*, 377-80.

[4] PARKER'S *Correspondence*, 66.

[5] *Ibid.* (Cecil to Parker, Aug. 12, 1561), 148. Parker replies: "I was in an horror to hear such words to come from her mild nature and christianly learned conscience, as she spoke concerning God's holy ordinance and institution of matrimony;" and he complains that she holds that the English clergy "alone of our time" are "openly brought in hatred, shamed and traduced before the malicious and ignorant people, as beasts without knowledge to Godward, in using this liberty of his word, as men of

1559, she had grudgingly given her consent to clerical marriage, though it was hampered by severe conditions. "It is thought therefore very necessary, that no manner of priest or deacon shall hereafter take to his wife any manner of woman without the advice and allowance first had upon good examination by the bishop of the same diocese, and two justices of the peace of the same shire, dwelling next to the place, where the same woman hath made her most abode before her marriage; nor without the good will of the parents of the said woman, if she have any living, or two of the next of her kinsfolk, or, for lack of knowledge of such, of her master or mistress, where she serveth." If "any shall do otherwise," he is forbidden to administer either the "word" or the "sacraments," and is declared incapable of "any ecclesiastical benefice." The marriage of a bishop is allowed only on approval of the "metropolitan of the province" and of "such commissioners" as the queen may appoint; while the master, dean, or head of a college must obtain the consent of those to whom the right of visitation belongs, who shall provide that the marriage "tend not to the hindrance of their house."[1] Two years later "the queen further ordained that, upon pain of forfeiting his office, no head or member of any college or cathedral church should have his wife or other woman within the precincts,"[2] and "in the thirty-nine articles of 1563 the marriage of the clergy was recognized as permissible."[3] Still throughout the reign of

effrenate intemperancy. . . . . Insomuch that the Queen's Highness expressed to me a repentance that we were thus appointed in office, wishing it had been otherwise." —*Correspondence*, 156, 157. Marriage of priests was defended by Cox, *ibid.*, 151.

[1] GEE AND HARDY, *Documents*, 431, 432; PROTHERO, *Statutes and Documents*, 184 ff.; CARDWELL, *Doc. Ann.*, I, 192, 193; MAKOWER, *op. cit.*, 223 n. 27; BURNET, *Hist. of Reformation*, I, 577. These regulations of marriage are mentioned by PERCIVAL WIBURN in *Zürich Letters*, II, 359. *Cf. ibid.*, II, 61 n. 129; I, 164, 179, 358. Compare the hostile "Articles of Visitation" of Bishop Bonner, 1554: CARDWELL, *op. cit.*, I, 125, 126; and compare *ibid.*, 153, 171, 172.

[2] MAKOWER, *op. cit.*, 223 n. 28; CARDWELL, *Doc. Ann.*, I, 273.

[3] See the extract from the thirty-second article in MAKOWER, *op. cit.*, 223 n. 29.

Elizabeth, apparently, clerical marriages continued to be resisted; for "in the *Millenary Petition* addressed by the Puritans to James I. at his accession, among other requests was one for the restoration of the laws of Edward VI. as to the marriage of priests.[1] That restoration and, consequently, the repeal of the obstructing act of Mary were accomplished" in 1603.[2]

In fact, the primitive ascetic ideal was by no means utterly extinct among the Protestant theologians of the Tudor period. Some, like Latimer, Fulke, and Hutchinson, insist that matrimony is inferior to virginity;[3] and very generally it is still held to be ordained of heaven, especially as a "remedy" for sin, though more worthy motives are admitted. According to Bradford, God "has made womankind, and ordained the state of matrimony," "not only for the help and community of man, but also for a remedy of man's infirmity."[4] Bullinger assigns the usual three reasons "for which God hath ordained marriage for men to embrace." The "first cause why wedlock was instituted is man's commodity, that thereby the life of man might be the pleasanter and more commodious; for Adam seemed not to live half happily nor sweetly enough, unless he had a wife to join himself unto; which wife is not in the scriptures called an impediment or necessary evil, as certain poets and beastly men who hated women have foolishly

[1] MAKOWER, *op. cit.*, 223, 71. The *Millenary Petition* is in GEE AND HARDY, *Documents*, 508–11; PROTHERO, *Statutes and Documents*, 413–16; according to Makower, in PERRY, *Hist. Eng. Church*, II, 372, c. 22, notes and illustrations; COLLIER, *Eccles. Hist.*, ed. 1852, VII, 273.

[2] By 1 James I., c. 25, sec. 8: PROTHERO, *Statutes and Documents*, 255; *Statutes at Large*, II, 640. *Cf.* MAKOWER, *op. cit.*, 224.

[3] "But when thou livest godly and honestly in single life, it is well and allowable afore God; yea, and better than marriage."—LATIMER, *Sermons*, 393, 394. *Cf.* FULKE, *Answers*, 228, 383; *idem*, *Defence*, 492; HUTCHINSON, *Works*, 148; see also CARTWRIGHT, in WHITGIFT'S *Works*, III, 293. But see the curious passage in TYNDALE'S *Doctrinal Treatises*, 21, which should be compared with his argument against the doctrine that "widowhood and virginity exceed matrimony," *ibid.*, 313–15.

[4] BRADFORD, *Writings*, I, 167.

jangled."[1] The "second cause is the begetting of children for the preservation of mankind;" and the third is to provide a safeguard against the weakness of the flesh.[2]

Thus the change effected by the religious revolution in the conception of marriage, highly important as it was from a speculative point of view, was not destined to bear its proper fruit until after many days. In Germany, after a time, the bolder and more liberal teachings of Luther were generally ignored; so that by the middle of the seventeenth century the reactionary theories which had then gained ascendency were substantially in harmony with the ideas of the English clergy. In both countries the ecclesiastical courts still continued to try matrimonial causes in the spirit of the canon law; and more and more, as the new churches grew in power and became conservative, did the theological view of the nature of marriage approach the ancient dogma. "According to the canon law, the church claimed matrimonial jurisdiction because marriage was a sacrament; by the Protestants marriage was made almost a sacrament because the church exercised matrimonial jurisdiction."[3] Not until the full triumph of civil marriage in the nineteenth century were the logical results of the new doctrines at last attained.

III. CHILD-MARRIAGES IN THE AGE OF ELIZABETH

Seldom has a more vivid light been thrown on social conditions than that afforded for the age of Elizabeth by the depositions taken in the bishop's court of the diocese of Chester, 1561–66, and edited for the Early English Text

[1] BULLINGER quotes in favor of marriage the views of ANTIPATER, *In sermone de nuptiis*, and HIEROCLES, *De nuptiis*.

[2] BULLINGER, *Decades*, I, 394-410. The three reasons are also given by SANDYS, *Sermons*, 316 ff.; and JAMES I., "Basilikon Doron," *Workes* (London, 1616), 171. On marriage as a "remedy" *cf.* also CRANMER, *Misc. Writings*, 115, 116; TYNDALE, *Expositions*, 125; HOOPER, *Early Writings*, 381; BECON, *Catechism*, 103.

[3] FRIEDBERG, *Echeschliessung*, 192.

Society by Furnivall in 1897. Their value for the student is enhanced by the very lively "forewords" of the learned and enthusiastic editor. The evils naturally flowing from the law and doctrine of espousals are here realistically disclosed in the "trothplights" and the similar cases of "clandestine marriages."[1] There is the usual juggling with the words of the present or future tense; and the usual puzzling over conditions and irregular phrases. For the basest of motives girls are tricked into vows which may or may not prove to be valid marriages according to the uncertain interpretation of the words or acts of betrothal sworn to in court. "Ten of the seventeen cases" of trothplight, says Furnivall, "show us men trying to sneak out of their contracts when they've had their fill of pleasure with the women."[2] Needy and unscrupulous priests, worthy predecessors of the notorious Fleet parsons, without banns or license, are seen "solemnizing" the nuptials "accordinge to the book of Common prayer," in a private house, in a meadow, or on the "heighe waie," during "the night season" and "by the lighte of the moone."[3]

The astonishing prevalence of child-marriages is, however, the most important fact revealed by these documents.[4] In a single diocese during the short space of six years, besides three "ratifications," occurred twenty-eight cases of so-called divorce or voidance of contracts which were formed in infancy or early childhood. The age of the persons varies from two

[1] For the trothplights and clandestine contracts see FURNIVALL, *Child-Marriages*, xliii-liii, lxii, lxiii, 56–71, 140, 141, 184–202. CHAMBERLAIN, *The Child and Childhood in Folk-Thought*, 224–33, has made good use of Furnivall's collection.

[2] FURNIVALL, *op. cit.*, xliii.

[3] *Ibid.*, 140, 141. Further light is thrown on the secret marriages by the cases of adultery and affiliation: *ibid.*, 72–102, 202–204.

[4] *Ibid.*, xv-xliii, 1–55, 183, 184. In addition to these Chester cases FURNIVALL (xxi-xliii) presents very interesting material regarding child-marriages, some of which were before or after the age of Elizabeth. Two cases under Henry VII. and Henry VIII., respectively, are mentioned in *Reports of the Hist. Manuscripts Commission*, III, 247. Sometimes such marriages were secured by abduction or conspiracy: see *ibid.*, III, 55, 59, 61 (three cases in the reign of James I.).

to thirteen years; and in at least ten cases the girl is older than the boy. It should also be observed that these thirty-one contracts are merely those brought before the court for confirmation or annulment after at least one of the parties has reached the age of puberty, which by the canon law is fixed at twelve for females and fourteen for males. It is, of course, proper to assume that the number of child-marriages which never thus came up for settlement was very much larger than the number of those which did so arise. What the number for all England may have been during the period, it is startling to contemplate! Moreover, the majority of these marriages took place, not among the rich or noble, but among common people of small means. In a number of instances we are told in the record that the infant bride or bridegroom was carried before the priest in someone's arms. Thus, in a case which arose in 1564, a witness deposes that "he was present bie, when John Somerforth and Jane Brerton were maried together in the parish church of Brerton about xij yeres ago . . . . that he carried the said John in his armes, beinge at tyme of the said Mariage about iij yeres of age, and spake somme of the wordes of Matrimonye, that the said John, bie reason of his younge age, cold not speake hym self, holdinge him in his armes all the while the wordes of Matrimonie were in speakinge. And one James Holford caried the said Jane in his armes, beinge at the said tyme about ij yeres of age, and spake all, or the most parte of, the wordes of matrimony for her." Being further "required whether the said marriage was euer ratified bie carnall Copulacion or other meane, Answereth that, in his Conscience, it was neuer." Another witness testified to the same facts and added, "it was the youngest Mariage that euer he was at."[1]

Looked at from a religious point of view, it would be hard to imagine a more absurd travesty of "holy wedlock"

[1] FURNIVALL, *op. cit.*, 25, 28.

than such proceedings conducted by the parish priest.[1] Nor was there much sentiment involved in the matter. If the great folk betrothed their children while babes to escape the king's right of wardship, the small folk were influenced by like motives on a smaller scale. "If the parent of either child is mercenary," summarizes Furnivall, "a money-bargain is made for it: the father of a boy of two, gets from an older girl's father, 'monie to bie a pece of land,' and executes a Bond to repay the money if his boy doesn't marry the girl (pp. 6–9). In another case, the boy's father is in debt, 'and to get somme money of William Whitfield, to the discharge of his debtes, maried and bargained his sonne to the said Whitfeildes doughter' (pp. 23, 24). Again, a girl of 3 or 4 is married to a boy of 7 'biecause her frendes thought she shuld have had a lyvinge bie hym' (p. 4), and her father-in-law is under Bond to marry them (p. 5). So again, a girl's father says that she married a boy of her own age, 11–12 'biecause she shold have had bie hym a prety bargane, yf they cold have lovid, on the other' (p. 12). Another girl of 11 is married to a boy of 9, because, on her father's death, the boy's father gets the landlord's leave to take-on the girl's house (p. 10). Another girl of 8 is married to a boy of 10, because the boy's father feard 'lest he shuld lose his parte of his lyvinge' in a tenement which he held in common with the girl's protector (p. 14). In another instance, the girl's grandfather 'was a very welthie man; and it was supposed that he wold have bene good vnto' her & her boy-husband, 'and bestowid somme good ferme apon her' (p. 32), so a boy of 12 married her when she was 10. Other children are married 'bie the compulsion of their frendes' (pp. 11, 13, 23 &c.); another 'by a wile' (p. 16), the girl being invited

[1] In the light of these facts, some of the discussions of child-marriages in India, often intolerant or condescending, have a very curious interest; compare the sensible and instructive paper of REES, "Meddling with Hindu Marriages," *Nineteenth Century*, Oct., 1890, 660–76.

by a relation of the boy's to come and make merry, and then married to the boy against her consent. But in one case, a girl arranged her own marriage. She was 'a bigge damsell & mariageable' (p. 47), that is, past 12, and evidently fancying a nice boy of 10–11, 'intised hym with two Apples, to go with her to Colne, and to marry her' (p. 45). No wonder that this boy 'repentid' next morning, and that others say 'at the tyme of their mariage they knewe not what they did' (p. 15)."[1]

[1] FURNIVALL, *op. cit.*, "Forewords," xv, xvi.

According to SWINBURNE, *Of Spousals*, 18 ff., both by civil and canon law, children are infants until they have completed the seventh year; and "Spousals contracted during Infancy are utterly *void*, whether the Infants themselves, or their Parents for them, do make the Contract." After the close of that period such void contracts may be ratified by express words or by deeds. On the other hand, spousals contracted between infancy and the "ripe" years of twelve or fourteen are voidable by either spouse when that age is reached. To express dissent divorce proceedings are not necessary, although a divorce may be desirable to prevent future question. Either party may cancel the contract by simply marrying another person; just as a child-marriage may be ratified by words of consent or by simply living together as husband and wife: compare FURNIVALL, *op. cit.*, xix–xxv; and *The Lawes Resolutions of Womens Rights*, 7, 52, 57.

CHAPTER X

RISE OF CIVIL MARRIAGE

[Bibliographical Note X.—The beginning of the Puritan conception of marriage as a civil contract is best seen in Whitgift's "Defence of the Answer," *Works* (Parker Society, Cambridge, 1851–53), comprising Cartwright's *Reply to the Answer*, as well as extracts from the *Answer* itself, and from the original *Admonition* of 1572 which gave rise to the whole controversy. The views of the Independents, when fully developed, find their fullest expression in the writings of Milton on marriage and divorce, constituting, besides scattered allusions, Vol. III of his *Prose Works* (Bohn ed., London, 1888); the *Likeliest Means to remove Hirelings out of the Church*, and the version of Bucer's *De regno Christi*, entitled *The Judgment of Martin Bucer*, being of special interest in this connection. For the early period some useful material is afforded by Prothero's *Statutes and Constitutional Documents* (Oxford, 1894); Brereton's *Travels in Holland*, 1634–35: "Chetham Society Publications," Vol. I; Hallam's *Constitutional History* (New York, 1880); and Ranke's *England in the Seventeenth Century* (Oxford, 1875).

The act of 1653 is contained in Scobell's *Collection of Acts and Ordinances, 1640–1656* (London, 1658); and in the contemporary newspaper entitled *Several Proceedings of Parliament*, No. 6; but, like all the acts of the revolutionary period, it is omitted in every edition of the *Statutes at Large*. Original material for a study of the administration of this law may be found in the parish registers covering the interregnum edited by Bulwer, *Parish Registers of St. Martin-cum-Gregory in the City of York*, Part IV (York, 1895); Cowper, *The Booke of Register of the Parish of St. Peter in Canterbury* (Canterbury, 1888); *Parish Registers of Ellough, Suffolk* (privately printed, 1886); Hoveden, *The Register Booke . . . . of the Cathedral and Metropoliticall Church . . . . of Canterburie* (Harleian Society, London, 1878); Margerison, *The Registers of the Parish Church of Calverley, in the West Riding of . . . . York* (Bradford, 1880–87); Moore, *Registers of Broad Chalke, County Wilts* (London, 1880); Phillimore, *Gloustershire Parish Registers* (London, 1896); Radcliffe, *The Parish Registers of St. Chad, Saddlworth in County of York* (Uppermill, 1887); Sanders, *The Parish Registers of Eastham, Cheshire* (London, 1891); *idem*, *The Parish Registers of Bebington, County Chester* (Liverpool, 1897); Stavert, *The Parish Registers of Burnsall-in-Craven* (Skipton, 1893); and Turner,

The Non-Conformist Register (Brighouse, 1881). There is an interesting table in Graunt's *Natural and Political Observations* (Oxford, 1665); and examples of marriage certificates and other records under the act of 1653 may be found in *The Register Booke of Inglebye iuxta Grenhow* (Canterbury, 1889); Burn's *Parish Registers;* Friedberg's *Eheschliessung; Notes and Queries* (London, 1850 ff.); and the *Gentleman's Magazine* (London, 1731 ff.). The two periodicals just mentioned, like the *Monthly Review* (London, 1749 ff.), contain a great deal of matter — curious antiquities as well as serious discussion — relative to Fleet marriages, the Hardwicke act, and other phases of the subject. Inderwick's *Interregnum* (London, 1891) has an instructive discussion of some questions connected with the marriage act; and like Jenk's *Constitutional Experiments* (Cambridge, 1890) it is valuable for appreciating the legislation of the Commonwealth. Lathbury's *History of the Book of Common Prayer* (Oxford and London, 1859) describes the operation of the act; and some cases noted in Jeaffreson's *Middlesex County Records* (London, n. d.) prove the need of the safeguard against abduction or fraud afforded by the act; and there are a number of useful documents in the *Reports of the Historical Manuscripts Commission.* Illustrations of the ridicule called out by banns in the market-place and the justices' celebration may be found in Butler's *Hudibras* (Boston, 1864), and Flecknoe's *Diarium* (London, 1656).

On the Fleet and Mayfair celebrations Burn's now very scarce *Fleet Marriages* (2d ed., London, 1834) is the chief authority. It is supplemented by his *Parish Registers;* and these books as well as the original sources have been used for Friedberg's excellent account in the *Eheschliessung*, which on this topic and the whole ground covered by the present chapter is a trustworthy guide. A famous contemporary book is Brady's *Some Considerations upon Clandestine Marriages* (2d ed., London, 1750). There is an article by Ewald, "Fleet Marriages," in his *Paper and Parchment* (London, 1890); and Waters's excellent *Parish Registers* (new ed., London, 1883) is more reliable than the similar work of Burn. Fleet marriages are also discussed, with interesting extracts from the contemporary newspapers, by Tegg, *The Knot Tied* (London, 1877); Ashton, *The Fleet* (London, 1889); and Jeaffreson, *Brides and Bridals* (London, 1872), whose book, like Brand's *Observations on the Popular Antiquities of Great Britain* (London, 1873–77), contains a mass of information relating to every phase of marriage customs. On these marriages and on the Hardwicke act see also Horace Walpole's *Letters* (London, 1880); and Lecky, *History of England in the 18th Century* (New York, 1879).

Many illustrations of matrimonial usage and folklore may be found in Howlett, "Marriage Customs," in Andrews's *Curious Church Customs* (London, 1895); Edgar, "Marriage in Olden Times," in his *Old Church*

Life in Scotland (London, 1886); Vaux, "Marriage Customs," in his *Church Folklore* (London, 1894); Ashton, *Social Life in the Reign of Queen Anne* (London, 1882); and Hutchinson, *Chronicles of Gretna Green* (London, 1844). In England as well as in Germany the question of polygamy was much debated. A version of Ochino was brought out by Garfeild, *A Dialogue of Polygamy* (London, 1657). This was followed by the anonymous *Concubinage and Polygamy Disproved* (London, 1698); Turner, *Discourse on Fornication with an Appendix on Concubinage* (London, 1698); Delany, *Reflections upon Polygamy* (London, 1737), opposing the practice; Hamilton, *A Treatise on Polygamy proving it to be the Will of God* (Dublin, 1786); especially the notorious work of Madan, *Thelyphthora; or a Treatise on Female Ruin* (2d ed., London, 1781); answered by Towers, *Polygamy Unscriptural; or two Dialogues between Philalethes and Monogamus* (London, 1780); by Hill, *The Blessings of Polygamy* (London, 1781); and more elaborately by Cookson, *Thoughts on Polygamy* (Winchester, 1782). See also Dwight, *The Hebrew Wife* (Glasgow, 1837); and Colenzo, *A Letter to the Archbishop of Canterbury* (Cambridge, 1862).

The development of contemporary sentiment and opinion may be traced in *The Lawes Resolutions of Womens Rights* (London, 1632); Courtin, *A Treatise of Jealousie* (London, 1684); Salmon, *A Critical Essay Concerning Marriage* (London, 1724); De Foe, *Religious Courtship* (London, 1729); Astell's sensible and liberal *Reflections upon Marriage* (4th ed., London, 1730); the critical and vigorous *Hardships of the English Laws in Relation to Wives* (London, 1735); Dove, *Dissertations on Marriage, Celibacy*, etc. (1769); Giles, *A Treatise on Marriage* (London, 1771); the anonymous *Considerations on the Causes of the present Stagnation of Matrimony* (London, 1772), alleging the unreasonable authority of parents; *The Laws respecting Women, as they regard their Natural Rights* (London, 1777); Wollstonecraft, *A Vindication of the Rights of Men* (London, 1790); her more celebrated *A Vindication of the Rights of Woman* (London, 1792); Jay, *Essay on Marriage, or the duty of Christians to marry Religiously* (2d ed., Bath, 1807); *Observations on the Marriage Laws* (London, 1815); Thompson, *Marriage: Two Sermons* (London, 1837); and Wardell-Yerburgh (ed.), *Marriage Addresses and Marriage Hymns* (London and New York, 1900). For the socialistic marriage doctrines of Robert Owen and others see Bibliographical Note XVIII.

For the debates on the act of 1753 see Cobbett, *Parliamentary History*, XV; the lively comments of Horace Walpole in his *Letters;* and the same writer's account of the proceedings in his *Memoirs of the Reign of George the Second* (2d ed., London, 1847). The act is harshly criticised by Madan; and among the writings which it called forth are *Considerations on the Bill for preventing Clandestine Marriages* (Lon-

don, 1753); Fry, *Considerations on the Act to prevent Clandestine Marriages* (London, 1754); Merrick, *Marriage a Divine Institution* (London, 1754), approving the conservative views of Stebbing, *An Enquiry into the Force and Operation of the Annulling Clauses* (London, 1754); *idem, A Dissertation on the Power of States to deny Civil Protection to the Marriage of Minors* (London, 1755); both papers being criticised by Sayer, *A Vindication of the Power of Society to Annull the Marriage of Minors* (London, 1755). The acts of 1753 and 1836 are noticed also by Mahon, *History of England* (New York, 1849); Knight, *History of England* (New York, 1880); Lecky, *Democracy and Liberty* (New York, 1896); and Spencer Walpole, *History of England* (London, 1890).

On the existing law as developed since 1753, especially the acts of 1836, the *Parliamentary History* and the *Parliamentary Debates* are of course necessary; and for this topic, as well as for the entire chapter, the *Statutes at Large* are in constant requisition. There are contemporary notices of the acts of 1823 and 1836 in the *Annual Register*, LXV and LXXVIII; while the sources have been carefully examined by Oppenheim in his valuable monograph, "Ueber die Einführung der Civil-Ehe in England," in *ZKR.*, I (Berlin, 1861). The temper and arguments with which the efforts to secure justice were opposed are disclosed in *A Letter to the . . . . Earl of Liverpool* (London, 1827) by a "Presbyter of the Church of England;" Le Geyt, *Observations on the Bill now before Parliament* (London, 1827); and Griffin-Stonestreet, *Nuptiæ Sacræ: Objections to the Amended Unitarian Marriage Bill* (London, 1828). See further Phillimore, *Substance of the Speech . . . . on moving . . . . to amend the Marriage Act* (2d ed., London, 1822); and Lawton's edition of *The Marriage Act, 4 Geo. IV., c. 76* (London, 1823); Beard, *Notes on Lord John Russel's Marriage Bill* (London, 1834); and in particular the "Report of the Royal Commission on the Laws of Marriage," in *British Documents*, 1867–68, XXXII (London, 1868). Of service also are Cooke, *A Report of the Case of Horner against Liddiard*, Consistorial Court of London, 1799 (London, 1800); Poynter, *Doctrine and Practice of the Ecclesiastical Courts in Doctors Commons* (London, 1822); Robertson, *The Law of Legitimation by Subsequent Marriage* (London, 1829); Moodie, *Principles, Changes, and Improvements in the Law of Marriage* (London, 1849); Wilks, *Present Law of Banns a Railroad to Marriage* (London, 1864), with which may be compared Ewen, *Proclamation of Banns in Scotland* (Edinburgh, 1877).

The best short technical treatises on the English marriage laws as a whole are Hammick's *The Marriage Law* (London, 1887); Geary's *Marriage and Family Relations* (London, 1892); Ernst's *Treatise on Marriage and Divorce* (London, 1879); and the concise discussions in

Brett's excellent *Commentaries on the Laws of England* (London, 1891). Of some service also is Tegg's popular book, *The Knot Tied*, already mentioned; and the compact manual of Moore, *How to Be Married* (London, 1890), is convenient for ready reference. Useful likewise in this study are the works of Blackstone, Toulmin Smith, Bishop, Evans, Fischel, Burn (*Ecclesiastical Laws*), Bohn (*Political Cyclopædia*), all of which have been mentioned in preceding Notes; as well as Campbell, *Chancellors* (4th ed., London, 1856–57); Howell, *State Trials* (London, 1809–28); Molesworth, *History of England* (London, 1877); May, *Constitutional History* (New York, 1880); Taswell-Langmead, *Constitutional History* (London, 1880); Green, *English People* (New York, 1880); and the valuable article on "Marriage" by Robertson in the *Encyclopædia Britannica*, XV.]

I. CROMWELL'S CIVIL MARRIAGE ACT, 1653

IT was not until the middle of the seventeenth century that the ideas of the early German[1] Reformation relating to the temporal nature of marriage gained ascendancy in England, and then only for the brief period of the Commonwealth. Yet the civil-marriage act of 1653 is of extraordinary historical interest, not only as an example of the statesmanship of Cromwell, so often anticipating the reforms of our own age, but especially as being mainly the result of the revolt of the Puritans, more particularly of the Independents, against the unnatural union of church and state produced by the compromise of the sixteenth century, and of their intense hatred of the formalism and ceremonial of the "Romanizing" party in the established church. The act is of special significance for our present purpose, since it reveals the conceptions which shaped the matrimonial laws of New England. Paradoxical as it may at first glance appear, it cannot be doubted that the first establishment of obligatory civil marriage in England owes its origin chiefly to the desire of an intensely religious party to separate all things worldly from the func-

[1] FRIEDBERG, *Eheschliessung*, 324; WEBER, *Geschichte d. akathol. Kirchen und Secten von Grossbrittanien* (Leipzig, 1845), I, 1, 106 ff.; RICHTER, *Geschichte der deutschen Kirchenverfass.* (Leipzig, 1851), 175 ff.

tions of the clergy and the church.[1] True, a foreign people, closely related by blood and speech, with whom England had long had intimate relations and to whom the Puritans were drawn through sympathy with their heroic resistance to ecclesiastical oppression, had already provided a model, which may have had a certain influence. For in the Netherlands, on April 1, 1580, after the independence from Spain had been declared, the provinces of Holland and West Friesland had established a civil-marriage form, permissively even for the members of the Reformed church; and in principle this was adopted by the States General for the United Provinces in 1656, three years after the appearance of the English statute under consideration.[2]

Familiar as many Englishmen probably were with Dutch institutions,[3] and close as had been the relations of Dutch and

[1] *Cf.* FRIEDBERG, *Geschichte der Civilehe*, 12; *idem*, *Eheschliessung*, 322-25; RANKE, *Hist. Eng. in 17th Century*, III, 89; BLACKSTONE, *Commentaries*, I, 440.

[2] By this act the civil-marriage form was permitted, but not made obligatory. Members of the established church might solemnize their marriages before their own clergy; but the Lutherans and Catholics were not allowed a similar liberty; they must put up with the lay ceremony or accept the offices of a Reformed minister. This law remained in force until 1795, when, under the Batavian Republic, obligatory civil marriage was instituted, which is still in force in the kingdom of Holland by the statutes of 1833: see FRIEDBERG, *Geschichte der Civilehe*, 10-12; and his more elaborate treatment of civil marriage in Holland, *Eheschliessung*, 478-99.

[3] SIR WILLIAM BREERETON, who visited the Netherlands in 1634-35, gives an interesting notice of the religious wedding service. "Marriage," he notes, "likewise solemnized by the English and Dutch reformed churches, without the use of the ring or any ceremony, only an admonition precedes, directing how these married persons should demean themselves each to other, and for that end those Scriptures read hereunto most pertinent; as also a large discourse precedes, touching the institution of this sacred ordinance, and those texts hereunto pertinent also read." He mentions the marriage of a couple "who used the ring, and it was as long in solemnizing as our marriages, but I saw no other ceremony used but the ring and joining hands; after this concluded, all the bride's kindred, friends and acquaintances that are present, or meet with her, kiss her, even in the Church, when groom leaves her, and her own friends bring her near his house, when he meets, salutes her, and receives her. Among the Lutherans I observed that they bowed always at the name of Jesus, so often as it was used in the solemnity of their marriage, which was very often."—"Travels in Holland, etc., 1634-5," *Chetham Society Publications*, I, 63, 64. It is noticeable that Sir William says nothing of the civil-marriage ceremony, permitted in some provinces at this time. Between 1580 and 1656, in many cities, the Lutherans had gained the right to solemnize marriage according to their own rites: FRIEDBERG, *Eheschliessung*, 484.

English Puritans,[1] so important an event as the introduction of civil marriage can hardly be due primarily to imitation. Though Holland may have provided a model, it must be essentially the product of English religious history. Already in the reign of Elizabeth there are signs of discontent with the established ritual and with the quasi-sacramental character of marriage as conceived by the Anglican clergy. Especially obnoxious to the Protestant non-conformists, as appears from the well-known controversy between Whitgift and Thomas Cartwright, leader of the English Presbyterian party, are the use of the ring, the "worshipping" of the bride by the bridegroom, requiring the newly married pair to partake of the communion, and certain customs popularly connected with the wedding celebration, but not enjoined by the liturgy. "As for matrimony," runs a passage in the celebrated *Admonition to the Parliament*, published in 1572, "that also hath corruptions, too many. It was wont to be counted a sacrament; and therefore they use yet a sacramental sign, to which they attribute the virtue of wedlock, I mean the wedding-ring, which they foully abuse and dally withal, in taking it up and laying it down: in putting it on they abuse the name of the Trinity, they make the new-married man, according to the popish form, to make an idol of his wife, saying 'with this ring I thee wed, with my body I thee worship,' etc. And because in popery no holy action may be done without a mass, they enjoin the married persons to receive the communion (as they do their bishops and priests when they are made), etc. Other petty things out of the book we speak not of, as that women, contrary to the rule of the apostle, come, and are suffered to come, bareheaded, with bagpipes and fiddlers before them, to disturb the congregation, and that they must come in at the great door of the church, else all is marred [with divers other heathenish toys

[1] See CAMPBELL, *The Puritan in Holland, England, and America*, I, 485 ff.

in sundry countries, as carrying of wheat-sheaves on their heads, and casting of corn, with a number of such like, whereby they make rather a May-game of marriage than a holy institution of God]."[1]

In his *Answer to the Admonition* Whitgift denies that the ring is looked upon as a "sacramental sign," and admits that "it is not material" whether it "be used or not;" while he quotes with approval Bucer's opinion[2] that the "ceremony is very profitable, if the people be made to understand what is thereby signified, as that the ring and other things, first laid upon the book, and afterward by the minister given to the bridegroom to be delivered to the bride, do signify that we ought to offer all that we have to God before we use them, and to acknowledge that we receive them at his hand to be used to his glory. The putting of the ring upon the fourth finger of the woman's left hand, to which, as it is said there cometh a sinew or string from the heart, doth signify that the heart of the wife ought to be united to her husband; and the roundness of the ring doth signify that the wife ought to be joined to her husband with a perpetual band of love, as the ring itself is without end." Cartwright in his *Reply* declares that "if it be M. Bucer's judgment which is alleged here for the ring, I see that sometimes Homer sleepeth. For, first of all, I have shewed that it is not lawful to institute new signs and sacraments. And, then, it is dangerous to do it, especially in this which confirmeth the false and popish opinion of a sacrament." Next he ridicules Bucer for his "fond allegories" touching the ring, and thinks that having

[1] *Admonition*, the Ninth: WHITGIFT, "Defence of the Answer," *Works*, III, 335.

[2] BUCER, *Script. anglic. basil.*, *1577*, *Censur. in ordinat. eccles.*, c. XX, 488, 489: WHITGIFT, *Works*, III, 353, 354, note. Bucer is the great Protestant authority on the question of marriage and divorce. Milton calls him the "pastor of nations" (*Works*, III, 285), and congratulates himself on having independently reached similar conclusions (*ibid.*, 282 ff.). See especially MILTON'S "Judgment of Martin Bucer concerning Divorce" (*ibid.*, 274–314), being a partial translation of the second book of BUCER'S *De regno Christi*, addressed to Edward VI.

"the minister to preach upon these toys" savoureth not of his learning and sharpness of judgment.[1] Whitgift, however, further defends the practice on the score of "convenience" and because it is "void of all manner of superstition."[2] Moreover, he sustains the requirement of communion, again quoting Bucer in its favor; accuses Cartwright of weak argument and of trying to make "schism in the church" by bringing forward popular customs, "mere trifles" not sanctioned by the "book" which is the real object of his attack; and rightly points out that "worship" implies not idolatry, since it signifies merely to "honor" and not to "adore" according to the more modern devotional sense.[3] Indeed, it is historically instructive that already in the sixteenth century the original meaning of "worship" should have passed out of common use.

But the attack of the sixteenth-century reformers was not directed solely against the ceremonies and phrases of the marriage ritual. A bold step was taken toward civil marriage when resistance was made to ecclesiastical jurisdiction in matrimonial causes on the ground that these belong to the temporal judge. On this subject Cartwright has a characteristic passage, disclosing his usual ignorance of history and his confusion of mind—of which Whitgift does not fail to take advantage—but nevertheless revealing plainly enough the new ideas which more and more came to the front during the Puritan revolution. "Another thing," he says, "is that in these courts (which they call spiritual) they take the knowledge of matters which are mere civil, thereby not only perverting the order which God hath appointed in severing the civil causes from the ecclesiastical, but justling also with

[1] CARTWRIGHT'S *Reply to the Answer*, in WHITGIFT, *Works*, III, 354.

[2] Thus in his "Defence of the Answer" (*Works*, III, 355) WHITGIFT apologizes for the use of the ring, seeing the "church hath thought it convenient," and since it is likewise "void of all manner of superstition, necessity of salvation, opinion of worshipping, and all other circumstances, that should take away the lawfulness of using it."

[3] WHITGIFT, *op. cit.*, III, 355-57.

the civil magistrate, and thrusting him from the jurisdiction which appertaineth unto him, as the causes of the contracts of marriage, of divorce, of wills and testaments, with divers other such like things. For, although it appertain to the church and the gouvernors thereof to shew out of the word of God which is a lawful contract or just cause of divorce, and so forth, yet the judicial determination and definitive sentences of all these do appertain unto the civil magistrate. Hereunto may be added, that all their punishments almost are penalties of money, which can by no means appertain to the church, but is a thing merely civil."[1]

So far as England is concerned, to assign the unfortunate "severing the civil causes from the ecclesiastical" under William the Conqueror to the "order which God hath appointed" may seem to the historical student a trifle bold; and Whitgift may well retort, if "'it pertain to the church to declare what is a lawful contract, and which be the just causes of divorce,' by what reason can you prove 'that the judicial determination and definitive sentence of those matters doth pertain to the civil magistrate only'? For is not he most meet to judge in these causes which best understandeth them?" But Whitgift himself undoubtedly begs the question when he advances the counter-statement that the civil magistrate already has authority in ecclesiastical cases, since "all jurisdiction that any court in England hath or doth exercise, be it civil or ecclesiastical," is "executed in her majesty's name and right," and comes "from her as supreme governor," so that in effect "we" make no "such distinction betwixt civil and ecclesiastical causes as the pope and you do;"[2] for this very blending of church and state under the "defender of the faith" is really the root of the whole matter in controversy. Yet Cartwright represents a good cause, however lame his defense of it may be. Again

[1] CARTWRIGHT'S *Reply to the Answer*, p. 150, sec. 3, in WHITGIFT, *Works*, III, 267.

[2] WHITGIFT, "Defence of the Answer," *Works*, III, 267.

returning to the charge, in effect he attacks the notorious character[1] of the spiritual courts themselves, referring to the "unfitness of those which are chief officers" in them; for "the most" of these officials, he affirms, "are either papists, or bribers, or drunkards (I know what I write), or epicures, and such as live of benefices and prebends in England and in Ireland, doing nothing of those things which appertain unto them."[2] Dilatory action in matrimonial causes was a standing grievance against the spiritual courts; and many "lamentable complaints and petitions" for redress, especially in cases where "summary hearing and speedy relief" are necessary, were addressed to the privy council. For this reason, in 1613, complaints from wives alleging desertion, cruel treatment, or "breach of the bonds of holy wedlock" on the part of their husbands were relegated to the High Commission for settlement.[3]

[1] The Reformers charged that the throng of greedy place-hunters, attracted by fees and emoluments, corrupted the courts as well as the entire ecclesiastical administration of the bishops: see particularly MILTON'S "Likeliest Means to remove Hirelings out of the Church," *Works*, III, 1–41: Sir Henry Spelman, he says, "proves that fees exacted or demanded for sacraments, marriages, burials, and especially for interring, are wicked, accursed, simoniacal, and abominable" (*loc. cit.*, 21). "Nor did other abuses imputed to these obnoxious jurisdictions fail to provoke censure, such as the unreasonable fees of their officers, and the usage of granting licenses and commuting penances for money. The ecclesiastical courts indeed have generally been reckoned more dilatory, vexatious, and expensive than those of the common law."—HALLAM, *Const. Hist.*, I, 115; *cf.* 454.

"At Durham, at Lancaster, and at Ely, the Bishops sitting each as a Pope in his own dominions professed to exercise temporal as well as spiritual power, but they had in fact permitted gross abuses to corrupt and obstruct the fountain of justice." —INDERWICK, *The Interregnum*, 184.

[2] CARTWRIGHT'S *Reply to the Answer*, p. 151, sec. 1, in WHITGIFT, *Works*, III, 268. WHITGIFT (*ibid.*, 269) rebukes Cartwright for his "slanderous and opprobrious speeches." *Cf.* the further discussion of the question of spiritual jurisdiction in matrimonial causes in WHITGIFT, *loc. cit.*, 543–46, where Cartwright quotes Beza, Calvin, and Peter Martyr in his favor.

In convocation, 1580, proposals were made to reform the ecclesiastical courts, but nothing was done. Again in 1594 a commission to inquire into abuses was appointed: HALLAM, *Const. Hist.*, I, 215 n. 1; STRYPE'S *Grindal*, 259, App., 97; and STRYPE'S *Whitgift*, 419.

[3] See secs. XX–XXII of the commission of James I. to the High Commission, in PROTHERO'S *Statutes and Const. Docs.*, 431–33. The signers of the "Millenary Petition," 1603, likewise pray for the restraint of the "longsomeness of suits in ecclesiastical courts (which hang sometimes two, three, four, five, six, or seven years)": PROTHERO, *op. cit.*, 415.

But adding to the powers of the "Ecclesiastical Star Chamber" would scarcely be regarded by the Puritans as even a satisfactory palliation for such a grievance. The policy of the Stuarts tended swiftly to mold their opinions into organized resistance; and the marriage question became at last one of the cardinal issues in the reform program. Thus in the "Millenary Petition" of 1603 the Puritan ministers, while objecting to the "cross in baptism," the "cap and surplice," profanation of the Lord's day, "double-beneficed men," "popish opinions," and "longsomeness of service," pray also for the reversal of "divers popish canons," such "as the restraint of marriage at certain times;" for greater caution in granting "licenses for marriage without banns;" and for the correction of "divers terms of priests and absolution and some other used, with the ring in marriage, and other such like in the book."[1] On the other hand, if the Puritan loathed the so-called "popish" tendencies of the established church, as these became more and more pronounced under the rule of Laud, both the Puritan and the Anglican united in merciless persecution of the adherents of Rome. The act of 1606, "to prevent and avoid dangers which may grow by Popish recusants," is one of the most barbarous of those which for ages disgraced the English statute book. By this law a "popish recusant convict," or a man whose wife alone is convicted of recusancy, is forbidden to "exercise any public office in the commonwealth," except "such husband himself and his children . . . . above the age of nine years abiding with him and his servants in household shall once every month at the least, not having any reasonable excuse to the contrary, repair to some church or chapel" of the establishment and "there hear divine service;" and unless, with his children and servants of meet age, he receives the sacrament

[1] *Ibid.*, 414, 415.

of the Lord's Supper when required by law, and "bring up his children in the true religion." Every married woman convicted of recusancy, her husband not being so convicted, who shall not "conform herself . . . . by the space of one whole year next before the death of her said husband, shall forfeit to the King's Majesty . . . . the issues and profits of two parts of her jointure and two parts of her dower, ... and also be disabled to be executrix or administratrix" of her husband, "and to have . . . . any part of his goods and chattels." Any child[1] sent abroad without the king's license, to prevent his "good education in England or for any other cause," may have "no benefit by any gift, conveyance, descent, devise or otherwise of any lands . . . . goods or chattels," until he reach the age of eighteen or more, when, as a condition of recovering his property, he must take an iron-clad oath of allegiance[2] and partake of the sacrament. In the meantime—and here a broad way was opened up for fraud and wickedness—all the rights mentioned are to pass to the "next of kin which shall be no Popish recusant." Moreover, this infamous statute imposes harsh penalties upon every recusant who shall hereafter be "married otherwise than according to the orders of the Church of England by a minister lawfully authorized." The man is "utterly disabled to have any estate of freehold in any the lands . . . . of his wife as a tenant by curtesy of England," or in case she have no lands he must forfeit a hundred pounds. The woman is not only disabled from claiming her dower or jointure, but is also denied her "widow's estate and frankbank in any customary lands whereof her husband died seized," as well as any part of her husband's goods "by virtue of any custom." Should a child be born to them, it

[1] Unless the child be a soldier, mariner, merchant, or a merchant's apprentice or factor.

[2] Prescribed by 3 and 4 James I.: PROTHERO, *op. cit.*, 259; *Statutes at Large*, II, 653.

must within a month be baptized in open church according to Anglican rites, under penalty of one hundred pounds for refusal.[1] In all other essential features during the first two Stuart reigns the law of espousals and marriage remained the same as during the age of Elizabeth.[2] After Laud gained control there was a strong tendency to accent those parts of the nuptial ceremonial which gave offense to the Puritans.[3] The civil war brought all this to an end; and "on January 3, 1644–5, a few days before the execution of Archbishop Laud, the Directory was by a solemn ordinance substituted for the Book of Common Prayer." But the form prescribed in the latter remained valid, "although the celebrant was liable to a fine of £5 for not using the form inserted in the Directory of Public Worship. Still many people clung to the ancient service, and amongst others Stephen Marshall the Preacher, who had a chief hand in compiling the Directory, deliberately made use of the Prayer Book in marrying his own daughter, when he paid down to the churchwardens the legal fine which he had incurred."[4]

[1] 3 and 4 James I., c. v: PROTHERO, *op. cit.*, 262–68; *Statutes at Large*, II, 656–62.

[2] For a concise and accurate account of the law of marriage as it stood under Charles I. see *The Lawes Resolutions of Womens Rights* (London, 1632), 51–115, 231 ff. Marriages on account of *disparitas cultus* were prohibited. "Amongst the hinderances of marriage note this also, that by Constitution of holy Church, marriage is forbidden betwixt persons of divers Religions, as Jews and Christian" (59). It does not appear, however, that such unions were invalid; nor is anything said of "mixed" marriages. There was no action, as in Germany, to compel the fulfilment of the *sponsalia* (54).

[3] CARDWELL, *Documentary Annals*, II, 200–207, gives Bishop Wren's "Orders and Directions" for the diocese of Norwich, 1636:

"XI. That they go up to the holy table at marriages at such time thereof as the rubric so directeth, and that the new married persons do kneel without the rail, and do at their own charge, if the communion were not warned the Sunday before, receive the holy communion that day, or else to be presented by the minister and churchwardens at the next generals for not receiving.

"XII. That no minister presume to marry any persons, whereof one of the parties is not of his parish, unless it be otherwise expressly mentioned in the license; nor that he marry any by virtue of any faculties or license, wherein the authority of an archdeacon or official is mentioned, *sub poena suspensionis*."

[4] WATERS, *Parish Registers in England*, 11, 16. *Cf.* LATHBURY, *Hist. of the Book of Common Prayer*, 310, and the authorities there cited. JEAFFRESON, *Brides and Bridals*, II, 69, gives the form of marriage contract prescribed by the Directory.

With the triumph of Cromwell the hour had come for realization of the new ideals. The act of 1653, though marking the end of a century of religious controversy in which not a little of bigotry and fanaticism on both sides is mingled, and though passed by the much-abused "Barebone's Parliament,"[1] is nevertheless a measure wise and clear, resting on principles which two centuries and a half of subsequent history have fully sanctioned. For, like so much of the legislation and experimentation of the period, it is anticipatory of the best reforms of the present age. With remarkable clearness and brevity, but with adequate fulness of detail, the form of celebration, the exercise of matrimonial jurisdiction, and the machinery of administration are provided for.[2]

An obligatory civil ceremony before a justice of the peace is prescribed. After due publication of banns, with a proper certificate thereof obtained from the parish register, the persons to be married are to come before "some justice of peace within and of the same county, city, or town corporate" where publication was made. If either of them is under the age of twenty-one, "sufficient proof of the consent of their parents or guardians" must be presented. The magistrate is required to "examine by witness upon oath, or otherwise . . . . concerning the truth of the certificate, and due performance of all the premises;" and he is also to take cognizance of any "exceptions" to the marriage "made or arising." If "no reasonable cause to the contrary" appear,

[1] For a fair estimate of the character of the "Barebone's Parliament," see INDERWICK, *The Interregnum*, 15–17; JENKS, *Const. Experiments*, 69–75.

[2] This marriage act of August 24, 1653, is contained in SCOBELL'S *Acts and Ordinances of Parliament*, 236–38, though, to the disgust of the historical student, not in any of the various editions of the *Statutes*. I have here used a copy of the act contained in a contemporary newspaper entitled *Several Proceedings of Parliament, from Tuesday the twenty-third of August, to Tuesday the thirtieth of August, 1653*, found in the fine collection of seventeenth-century pamphlets in the Sutro Library, San Francisco. An inaccurate copy of the principal provisions of the act is given by BURN, *Parish Registers*, 26–29; and there is a good summary in FRIEDBERG, *Eheschliessung*, 322, 323. On this act and the views of the Independents see COOK, "The Marriage Celebration in Europe," *Atlantic Monthly*, LXI, 255–57.

"the marriage shall proceed in this manner: The man to be married, taking the woman to be married by the hand, shall plainly and distinctly pronounce these words:

'I A. B. do here in the presence of God the Searcher of all Hearts, take thee C. D. for my wedded wife; and do also in the presence of God, and before these witnesses, promise to be unto thee a Loving and Faithful Husband.'" The woman in like manner taking the man by the hand accepts him for her husband, promising to be his "Loving, Faithful, and Obedient Wife."

The ceremony thus consists merely in the expression of mutual consent, accompanied by the interlocking of hands, the old handfasting; but the use of the ring is not permitted.[1] All legal requirements being satisfied, the justice pronounces the parties husband and wife; and their simple declaration, as above given, is to be taken "as to the form of marriage" to be "good and effective in law; and no other marriage whatsoever within the Commonwealth," after September 29, 1653, "shall be held or accompted a marriage according to the Laws of England."[2]

[1] Hence the ridicule of BUTLER, *Hudibras*, Part III, c. 2, 303-10 (Boston, 1864), II, 18:

"Others were for abolishing
That tool of matrimony, a ring,
With which th' unsanctify'd bridegroom
Is marry'd only to a thumb
(As wise as ringing of a pig,
That us'd to break up ground and dig),
The bride to nothing but her will,
That nulls the after-marriage still."

[2] *Cf.* FRIEDBERG, *Eheschliessung*, 322, 330. After the restriction was removed in 1656, marriages were frequently solemnized before the mayor and the minister of the parish jointly: BURN, *Parish Registers*, 162, 163, note; WATERS, *Parish Registers in England*, 16. In 1658, according to the register of St. Giles in the Fields, a marriage was celebrated by William Jervis, D.D., before witnesses, and then follows this entry: "That also the sd. marriage . . . . hath its consummation before John Lord Berksted, Lord Lieutenant of the Tower of London" according to the act of parliament, and before Sir Jno. Sedley of the county of Kent. Apparently this was a double celebration: *Notes and Queries*, 3d Series, I, 228. For this case see also JEAFFRESON, *Brides and Bridals*, II, 71, who affirms that usually the "wedding was religiously solemnized in church, after or before the performance of the purely civil affirmation in the magistrate's parlour, ... in accordance with the instructions of the 'Directory of Public Worship;'" and it seems that the celebration was sometimes conducted according to the Book of Common Prayer: LATHBURY, *Hist. of the Book of Common Prayer*, 310.

But this restriction was omitted when the act was confirmed in 1656.[1]

In thorough harmony with the doctrine that marriage is a "worldly thing" is the provision of this act depriving the clergy of jurisdiction in matrimonial causes and placing it in the hands of the justices of the peace. It is provided that all "matters and controversies touching contracts and marriages, and the lawfulness and unlawfulness thereof; and all exceptions against contracts and marriages, and the distribution of forfeiture within this act, shall be in the power, and referred to the determination of the justices of peace in each county, city, or town corporate, at the general quarter sessions," or to such "other persons" as the "parliament shall hereafter appoint." All offenses against the act committed on or beyond the sea are in like manner to be tried in the places where the offenders are taken. Jurisdiction in cases of divorce is not, however, mentioned in this act; nor was any provision made for the trial of such causes during the Commonwealth. Indeed, a strong religious prejudice still survived against divorce, even among the Independents. "Thus," says Mr. Inderwick, "while on the one hand they treated marriage as a civil contract, on the other they gave to it all the inviolability of a sacrament, an inconsistency which is, however, to be found in many other acts of this period. The Jewish law, to which they much adhered, provided for and regulated divorces. They were recognized by most Protestant communities, and Milton, oppressed by his own domestic difficulties, had written powerfully on the subject, but through all the minutes of the various parliaments and councils of state I find, what I conceive to be somewhat surprising, no trace of any proposal to introduce into England any system of divorce. And, indeed, the prejudice

[1] SCOBELL, *Acts and Ordinances*, 1656, c. 10, p. 394. *Cf.* also BUEN, *Parish Registers*, 29. In 1658 it was permitted to use the "accustomed religious rites" if the parties preferred: WOOD, *The Wedding Day*, 279.

against divorce appears to have been so strong that the laxity of the Jews in this respect was found in 1655 to be one of the strongest arguments against their proposed admission to the rights of citizenship."[1] Nor is there any clear provision for the determination of cases of separation and alimony; although the consistory and other ecclesiastical courts having been abolished, these questions in practice were managed by "delegates appointed by the Commissioners of the Great Seal[2] or by justices of the peace in quarter sessions—a course which would seem to have been the reasonable outcome" of the civil marriage act.[3] On similar grounds the county justices probably dealt with "matrimonial squabbles," though in one case at least the intervention of the Council of State was sought.[4]

On the other hand, the act of 1653 grants authority to the justices in cases of the marriage of minors through fraud or forcible abduction. According to Inderwick, the attempt to check this abuse was entirely novel. The Commonwealth, he says, "interfered in a manner[5] hitherto unknown for the

[1] INDERWICK, *The Interregnum*, 46.

[2] The act of 1650, c. 43: SCOBELL, *Acts and Ordinances*, 150, 151, contains a general provision for such a commission in cases of pretended marriages.

[3] INDERWICK, *op. cit.*, 183, 184.

[4] See the case of "John Buck and Mary his wife" in INDERWICK, *op. cit.*, 183. That the justices took a hand in these cases appears to be a reasonable conjecture.

[5] Something had, however, been done to check this evil by Tudor legislation. The act of 3 H. VII., c. 2, *Statutes at Large* (Ruffhead), II, 69, provides that if any-one take away against her will any woman, whether maid, widow, or wife, "having substances, some in Goods moveable, and some in Lands and Tenements, and some being Heirs apparent unto their ancestors," and marry her or cause her to be married or deflowered, or in any way aid or abet the same, he shall be guilty of felony; and the act of 39 Elizabeth, c. 9, *Statutes at Large*, II, 689, deprives such offenders of benefit of clergy. Again by 4 and 5 Philip and Mary, c. 8, *Statutes at Large*, II, 515, the abduction of a maid under sixteen is punishable by two years' imprisonment or a fine to be fixed by the Star Chamber; while the taking away and marrying or deflowering any woman child under that age is punishable with five years' imprisonment or a fine as in the first case. For these and the earlier statutes regarding rape see *The Lawes Resolutions of Womens Rights*, 376-90.

These acts, it should be noted, are quite restricted in their range and besides, by 1653, they seem to have become practically a dead letter; although in 1753 Attorney General Ryder declares they are still in force: HANSARD, *Parliamentary History*, XV, 3-5; and so does the act of 1650, c. 43: SCOBELL, *Acts and Ordinances*, 151. On

protection of women from those forcible abductions and marriages which were but too common under the former and later reigns of the Stuarts. Fraudulent marriages, induced by needy men or intriguing women, formed the common staple of the plays and interludes which the puritans so heartily condemned. In these comedies, while the unhappy father or deluded guardian was not infrequently the subject of mirth or of contempt, the lucky intriguer was made the hero of the play. From this species of offense, carried from the play-house into private life,[1] the middle class peculiarly suffered, and while the wealthy merchant or the prosperous tradesman had to endure as best he might the entrapping of his daughter or the abduction of his ward, the gay cavalier or dashing spark who carried her off was the lion of the hour. Of this phase of society the puritan party had long and loudly proclaimed their horror and detestation, and the Commonwealth was not long installed before an occasion arose which enabled them to give practical effect to their expressed opinions." This was the case of the forcible abduction of Jane Pickering, "who was the only daughter and heiress of Sir Thomas Pickering, knight and baronet, deceased." While "walking in Greenwich Park with her maids in October of 1649, she was seized by one Joseph Walsh and his companions" and transported to Flanders; "after which Walsh asserted a marriage to have taken place between them and was prepared to claim his pecuniary rights

the other hand, the act of the Commonwealth applies to all minors under twenty-one, men or women, whether heirs or possessors of property or not; the penalties were severe; and the fraudulent or forcible marriage is void.

[1] The MSS. of the Duke of Northumberland in *Reports of the Hist. Manuscript Commission*, III, 55, 59, 61, show entry before the Star Chamber of three such cases: On June 3, 1608, "Atty Gen. *v.* Thos. Mollineux, Riot and other Misdemeanors in marriage of daughter of Mr. Brooke against his will." Feb. 5, 1611-12, "Atty Gen. *v.* Humphry and Margaret Chatterton et al. Conspiring to deceive Lord Cavendish of his son, Sir William, aged 14, and King of his Wardship. Supposed contract of marriage between Sir William Cavendish and Margaret Chatterton, a waiting maid." Jan. 1612-13, "Elizabeth de la Fountaine, widow, *v.* Stephen Harvie et al. Practicing to steal away and marry plaintiff's daughter, aged 8."

as her husband." The Council of State took speedy action. The lady was eventually brought back to England. Under authority of an act of Parliament,[1] the case was tried in 1651 by a special court consisting of delegates appointed by the Lords Commissioners of the Great Seal; "and it is to be presumed that she had judgment in her favour, and her marriage set aside;" for subsequently an "indictment of felony was found against Walsh and his companions."[2] Accordingly the marriage act declares that if anyone by violence or fraud steal or cause to be stolen any person under the age of twenty-one years, "with intent to marry the said person," the offender shall forfeit his whole estate, one-half to the Commonwealth and one-half to the aggrieved, and besides "suffer strict and close imprisonment, and be kept to hard labor . . . . during life." Severe punishment likewise is prescribed for those aiding or abetting the crime; and any guardian or overseer who shall abuse his trust "by seducing, selling, or otherwise wilfully" promoting the marriage of his ward with another without such ward's free consent "shall forfeit double the portion which of right" belongs to the child.[3]

The change in matrimonial jurisdiction effected by this measure of the Commonwealth has a twofold significance. Not only is judicial authority thus vested in civil rather than spiritual tribunals; but it is placed in the hands of local judges. It is an illustration of the democratic or decentralizing tendency which marks the legislation of the seventeenth-century Puritans on both sides of the Atlantic. It was, moreover, natural that the county magistrates should be vested with these new functions. In the exercise of their

[1] The act (1650, c. 43) in SCOBELL'S *Acts and Ordinances*, 150, 151.

[2] INDERWICK, *op. cit.*, 40–43: citing *State Papers*, 1649-50; and WHITELOCK, *op. cit.*, III, 293, 319.

[3] For examples of marriages annulled by the quarter sessions under this act see JEAFFRESON, *Middlesex County Records*, III, 233, 234, 264; also INDERWICK, *op. cit.*, 43, 45.

general peace authority they had already performed duties not wholly dissimilar to some of those called for under the act. In certain instances, before as well as after the reign of Cromwell, one may be surprised to find the justices exercising a sort of jurisdiction in cases of alleged breach of promise. "Forasmuch," declare the magistrates of Devon in 1626, "as it hath apeared unto this court that Bridget Howsley of Langton, spinster, liveth idly and lewdly at home, not betaking herself to any honest course of life, and hath lately falsely and scandalously accused" a certain man of Honiton, "challenging a promise of marriage from him, which tended much to his disgrace, and that she is a continual brawler and sower of strife and debate between neighbors;" therefore it is ordered that the said Bridget "be forthwith committed to the House of Correction there to be set on work and remain for the space of six whole months," and thereafter until she find good sureties or a "master that will take her into service."[1] Here the justices may have acted merely as peace officers, though it is plain that as a precedent their sentence is far-reaching in its consequences. As late as 1835 we find the magistrates at Exeter, following the principle of the Roman law, "obliging a faithless swain to return a damsel's watch, and the latter to return half the value of a broach" which he had given her.[2]

In no respect is the essential "modernness" of Cromwell's marriage act more strikingly shown than in its provisions to secure publicity, with a safe and perfect record. Nothing so wise and practical in this regard was again seen in England until the law of 1836. It is provided that in each parish a register of marriages, births, and deaths shall

[1] ROBERTS, *The Social History of the People of the Southern Counties of England in past Centuries* (London, 1856), 204, 205.

[2] BURN, *Parish Registers*, 140 n. 1. By the code of Theodosius, already cited (above, p. 295), when the betrothal was sealed with a kiss, the lover received one-half of the gifts; but the woman, "whether kissing or not kissing, whatsoever she gave, she may ask and have it again": *ibid.*, 140. Compare *The Lawes Resolutions of Womens Rights*, 71, 72 (on "Wooing" and the "Condiments of Love").

be elected for three years by the contributors to the poor rate. The register is to be an "able and honest person," such "as shall be sworn and approved" by a justice of the peace, who is to enter the fact of election and qualification in the register book of the parish;[1] and he is removable either by the justice or by the parish with the justice's consent. A "Book of good Vellum or Parchment" is to be provided by each parish, in which it is the duty of the register to enter all marriages, births, and burials of "all sorts of people."[2]

Careful provision is also made for the publication of banns. All marriages must be announced either for three successive Sundays in church, or at the pleasure of the parties, during the same interval, in the market-place[3] "next to the said church or chappel." Before the publication the parties must file with the register a written statement of their names and places of residence, together with those of their parents or guardians; and these facts are then included in the notice. The register also enters the fact of publication and all objections brought forward against the marriage, with the names of those objecting. After publication the persons to be married are to obtain

[1] The following is a specimen of such entry by a justice, taken from the parish register of Shudy Camps, in Cambridgeshire (BURN, *op. cit.*, 26):

"Cambsh.—These are to certifie all whom it may concern y^t Jn^o Wignald Clerke (being elected Register of y^e parish of Shudy Camps by y^e Inhabit^ts. of y^e same Parish as hath appear'd unto me by a Certificate under y^e hands of y^e Inhabitants thereof) did come before me Tho. Benett Esq^r. one of y^e Justices for y^e peace of y^e s^d Countie and did take his oath for y^e due Execution of his office accg to y^e late Act of Parliam^t in y^t case made and provided. Which s^d John Wignald I do hereby constitute Register thereof. Accordingly witness my hand and seal this 10 of Jan. 1653. Tho. Benett."

For similar certificates see STAVERT, *Parish Register of Burnsall-in-Craven*, 88; COWPER, *The Booke of Register of the Parish of St. Peter in Canterbury*, 89; and WATERS, *Parish Registers in England*, 14.

[2] The fees for registration authorized are for each marriage 12d.; publication and certificate of marriage, 12d.; each birth or death, 4d.; and no charge in case of persons living by alms.

[3] The parish register of Boston, Lincolnshire, shows "that during the years 1656, 1657, and 1658 respectively the number of marriages proclaimed in the market-place were 102, 104, and 108, and of those announced in the church, 48, 31, 52."—WOOD, *The Wedding Day*, 278, 279.

the register's certificate of the fact and proceed to a justice of the peace. As already seen, they must also find witnesses, give evidence of the consent of parents or guardians, and cause to be confirmed by oath, or otherwise in the discretion of the magistrate, the genuineness of the certificate. After the ceremony, if desired by the parties, the officiating justice is required to give them a certificate of the solemnization properly signed by himself and the witnesses; and this certificate, if produced, shall be recorded by the clerk of the peace in each county in a book of parchment provided for the purpose.[1] The register of the parish is to "attend the said justice" to "subscribe the entry of every such marriage."

Nor did the system so well planned exist merely upon paper. The plain men chosen to the office of register did their work well, though they were sneered at as "mere laymen," and though they sometimes substitute rather harsh English for the worse Latin of their clerical predecessors. Greater publicity and more orderly records were secured during the Commonwealth than existed before it or after the Restoration. "It has been frequently asserted by writers on this subject," remarks Burn, a thoroughly competent judge, "that the registers during the time of Oliver Cromwell, were very badly kept;" but, on the contrary, "they were unusually well kept" where "a lay register was appointed according to the act of parliament." Such deficiencies as exist, he suggests, may result either from the destruction of the records or from neglect to turn them over at the Restoration or when the lay registers entered upon their functions.[2] Waters agrees with Burn;[3] and an examination of the published parish registers entirely confirms this view.[4] It is hard, therefore, to understand the

[1] The English clerk of the peace keeps the records of the quarter sessions and in a measure corresponds to the county clerk in the United States; *cf.* HOWARD, *Local Const. Hist.*, I, 315.

[2] BURN, *Parish Registers*, 52. [3] WATERS, *Parish Registers of England*, 17.

[4] The registration for the period of the act is very full in HOVEDEN, *The Register Booke . . . . of the Cath. and Met. Church of Christe of Cant.*, 58, 59; MARGERISON,

following curious statement by a contemporary writer who is clearly no admirer of Cromwell.[1] Referring to certain "bills of mortality" for Romsey in Hampshire and Tiverton in Devonshire,[2] he remarks "that in the years 1648 and 1649, being the time when the people of *England* did most

The Registers of the Parish Church of Calverly, II, 117-24; STAVERT, *The Parish Register of Burnsall-in-Craven*, 87-104. In PHILLIMORE'S *Gloustershire Parish Registers*, I, 9, there are no entries for 1653-54 and for several years before, while they are relatively full thereafter. BULWER'S *Parish Registers of St. Martin-cum-Gregory in the City of York*, II, 78-87, have a full record both before and after 1660. The same is true of COWPER'S *Booke of Register of the Parish of St. Peter in Canterbury*, 89-92, for the period 1640-60; while before 1640 there are fewer entries, and after 1660 a much less complete record. In SANDERS'S *Registers of Eastham, Cheshire*, 75-85, the record begins in 1654 after an interval of ten years; but his *Registers of Bebington, County Chester*, 129, show a blank for the years 1654-56. RADCLIFFE'S *Registers of St. Chad, Saddlworth*, supplement, 450-53, 444-49; and the *Register Booke of Inglebye iuxta Grenhow*, 165-69, are full and very interesting. Compare the other registers named in Bibliographical Note X, showing a few entries each year.

[1] JOHN GRAUNT, *Natural and Political Observations* (3d ed., Oxford, 1665), 158, 159 (Appendix). For calling my attention to this passage I am indebted to the kindness of Professor Charles H. Hull. In the "Introduction" to his edition of PETTY'S *Economic Writings* (Cambridge, 1899), I, xxxiv ff., lxxv ff., lxxx ff., may be found an account of Graunt's life and works.

[2] "The Table of the Parish of Tiverton" (GRAUNT, *Natural and Political Observations*, 158, 159):

YEARS	WEDDINGS	CHRISTENED			BURIED		
		M.	F.	Both	M.	F.	Both
1650	9	66	79	145	7	9	16
1651	9	50	63	113	5	10	15
1652	9	80	73	153	48	51	99
1653	21	89	219	208*	47	78	125
1654	108	105	101	206	72	68	140
1655	140	87	104	191	87	114	201
1656	109	107	90	197	56	86	142
1657	102	94	101	195	67	59	126
1658	60	70	83	153	77	85	162
1659	37	77	78	155	72	80	152
	604	815	891	1716	538	640	1178
1660	27	61	68	129	70	69	139
1661	38	83	93	176	73	85	158
1662	36	73	56	129	91	95	186
1663	35	68	64	132	72	74	146
1664	41	68	72	140	98	114	212
	177	353	353	706	404	437	841

*Error in the original.

GRAUNT'S "Table for the Country Parish"—identified by Hull with Romsey in Hampshire (PETTY, *Economic Writings*, II, 412)—affords similar evidence. The table for Cranbrook in Kent ends in 1649.

resent the horrid Parricide of his late Sacred Majesty, ... there were but nine weddings . . . . in the same places, when there were ordinarily between 30 and 40 *per Annum;* and but 16, when there were ordinarily . . . . between 50 and 60. And it may also be observed that something of this black murther appeared in the years 1643 and 1644 when the Civil war was at the highest, but the contrary [in the] years 1654, 1655, etc., to prevent the new way of Marriage then imposed upon the people." Just how the increase in the number of weddings recorded in the years 1654–58 may be explained as due to a desire "to prevent the new way of Marriage," we are not informed. It cannot be inferred that people hurried to get married in anticipation of the new law, for it was put in force the next month after its passage; nor that through zeal they married more rapidly according to the Book of Common Prayer, in defiance of the new civil forms, although in some cases the religious celebration may have been still employed. But it is useless to speculate as to the sense of the passage. The statistical tables for the two parishes submitted by this writer afford very strong evidence that the apparent increase in the number of weddings is mainly due to the fact that the records were better kept. It will be noticed that there is a corresponding rise in the number of christenings and burials; and this fact can scarcely be accounted for by assuming that people hastened to get born or to die through opposition to an ordinance of the Barebone's Parliament. After the Restoration there is a decided falling off in the registration.

The great success of this early attempt at reform in matrimonial administration cannot, however, be thoroughly appreciated unless one reflects that throughout the ages the matter of registration had been shamefully neglected and the record books recklessly destroyed. Their custody being "frequently committed to ignorant parish clerks, who had

no idea of their utility beyond their being occasionally the means of putting a shilling into their pockets for furnishing extracts;" and "at other times being under the superintendence of an incumbent, either forgetful, careless, or negligent, the result has necessarily been that many registers are miserably defective."[1] This judgment applies to the times following the Commonwealth as well as to the period falling between 1538 and the act of 1653.[2]

Many specimens of the marriage records of the Commonwealth have been discovered, representing each phase of procedure.[3] Of these the following entry of the marriage of Oliver Cromwell's daughter, taken by Waters from the register of St. Martin's in the Fields, may serve as an example:

"These are to certifie whom it may concerne, that according to a late Act of Parliament . . . . Publication was made in the publique meeting place, in the Parish Church of the parish of Martins in the Fields in the county of Middlesex, upon three several Lord's Days, at the close of the morning exercise, namely, upon the XXV. day of October MDCLVII., as alsoe upon the I. and VIII. day of November following,

[1] BUREN, *Parish Registers*, 40; *cf.* WATERS, *Parish Registers of England*, 10, 11.

In some books many entries are lacking, or there are breaks for several years together. Often the record is so carelessly made as to be of little value, even when not entirely illegible. Thus at St. Ewe, the "parishioners refusing to allow 5s. per annum for keeping a register, there was none kept for the years 1675–6–7," except two entries: BUREN, *op. cit.*, 41. The clerk of Plungar, Leicestershire, made use of the registration book for wrapping paper; and BUREN gives many other similar illustrations in his unique volume: *ibid.*, 41 ff.

[2] See chap. viii, pp. 359 ff., above.

[3] The most interesting published records of the period which I have seen are those contained in the *Register Booke of Inglebye iuxta Grenhow* (Canterbury, 1889), extending from March 13, 1654, to May 3, 1659. They are written in English. The next entry thereafter, without a word of comment on the change, is in Latin, as if appropriately to mark the return of the *ancien régime*. Extracts from various records will be found also in BUREN, *op. cit.*, 25, 26, 52, 54, 160 ff.; and of these several are reproduced by FRIEDBERG, *Eheschliessung*, 327, 328. See also *Reports of the Hist. Manuscripts Commission*, V, 594 (Par. Registrar, Mendlesham, Suffolk, 1653-57); *Notes and Queries*, 2d series, III, 306, 307; 3d series, V, 526 (from WILKINSON'S *Hist. of the Parochial Church of Burnly*, 1856); 3d series, I, 228; *Gentleman's Magazine*, LIV (1784), 8, giving a certificate of a marriage at Stratfield Saye, Southampton, October 2, 1654. It is printed in JEAFFRESON, *Brides and Bridals*, II, 68, 69, note. Compare the registers cited in Bibliographical Note X.

of a marriage agreed upon between the Honorable Robert Rich of Andrew's Holborn, and the Right Honorable the Lady Frances Cromwell, of Martins in the Fields, in the county of Middlesex. All which was fully performed according to the Act without exception.

"In witness whereof I have hereunto set my hand the IX. day of November, MDCLVII.

William Williams,
Register of the Parish of Martins in the Fields."

Then follows this entry "in the hand of Henry Scobell" who was doubtless the officiating magistrate:[1]

"Married, XI. Novemb., MDCLVII, in the presence of His Highness the Lord Protector, the Right Honble. the Earls of Warwick and Newport, Robert Lord Birch, the Lord Strickland, and many other."[2]

Sometimes the entries are fuller in details, and more ingenious in orthography. Here is one from the register of "Inglebye iuxta Grenhow":

"George Middleton of the Parish of Carleton husbandmā, son of William Middleton of the same parish husbandman & Isabell Easebie of Green-howe in the parish of Inglebye spinster daughter of Isabell Easbie of the said Greenhowe; having agreed to be married did deliver to me Williā Boweston of Inglebie aforesaid parish Register of the said Inglebie their names sirnames additions and places of aboade, & the same of their parents likewise in writeing upon the 19th of ffebruarie 1654. which was published in the publick meeting place of the said Inglebye commonly called the Church or chappell upon the 25th of februarie and the 4th & 11th of March 1654 at the Close of the morning exercise by me William Boweston Register.

[1] Henry Scobell was clerk to the Parliament until 1658, and compiler of the "Collections of Acts and Ordinances" of the revolutionary period.

[2] WATERS, *op. cit.*, 16, 17; BURN, *op. cit.*, 160; quoted also by FRIEDBERG, *op. cit.*, 328, note; and JEAFFRESON, *op. cit.*, II, 72, 73, note.

"And the said George Middleton & Isabell Easbie expressed their consēt unto Marriage by the words of the Act before George Marwood Esquire one of the Justices of the peace of the Countie of York & were by the said Justice declared to be husband & wife the 13th of March 1654

Geo: Marwood."[1]

Each of the two documents just presented, it will be noticed, consists of two parts: the certificate of the register to the magistrate; and the magistrate's entry in the register book after the ceremony has been performed. The following is an example of the marriage certificate which by the act the justice is to deliver to the parties, when required, to be filed by them with the county clerk of the peace, if they see fit:

"Fforasmuch as I, having received a certificatt of the date of the xiij of this month, under the hand and seale of Owen Perkins, Gent., Register of the consolidated Churches of Mathry, that Publicacon was made of an intencon of marriage three lord's days thenbefore in the said parish Church between Phillip Harry and Ann Harry, if not anything objected to the contrary, These are therefore at the desire of the Said parties to certify all whome it may concern, that according to the Act of Parliament for marriages, the Said Phillip and Anne this present day came before me, and taking each other by the hand did plainly and distinctly pronounce the words in the said Acte mencōēd to be pronounced by them, And thereupon, according to the said Acte, I pronounce them to be husband and wife. Given under my hand and seale the ffourteenth day of July, 1655

Thomas Davis."[2]

[1] *Register Booke of Inglebye iuxta Grenhow*, 75.

[2] *Notes and Queries*, 2d series, III (1857), 306, 307. For another certificate of the same kind, of a marriage published in the market-place, see *Gentleman's Magazine* (1784), 8; also quoted by FRIEDBERG, *op. cit.*, 327, 328, note; and other examples may be found in SANDERS's *Parish Registers of Eastham*, 76, note; and JEAFFRESON's *Middlesex County Records*, III, 223.

The law of 1653, it thus appears, constitutes a singularly important episode in the social and religious history of England. It remained in force, with a modification in 1656, during the seven years preceding the fall of the Commonwealth, and called forth the fierce opposition and hatred of the royalist party. It was ridiculed by the pamphleteer[1] and satirized by the poet.[2] Every provision drew forth a sneer.

[1] The output of controversial literature on this subject may have been great, as FRIEDBERG (*op. cit.*, 328 n. 2) suggests; but the number of pamphlets preserved does not seem to be large. In the valuable collection of the Sutro Library, containing thousands of pamphlets covering nearly every possible question debated at the time, I have been able to discover but two pieces on the civil-marriage law. One of these, a copy of the periodical entitled *Several Proceedings of Parliament*, publishes the act, which had just passed, without a word of comment. Friedberg had a similar experience in the Berlin Library.

[2] FLECKNOE'S *Diarium* (1656), 83, contains the following, quoted also by BUEN (*op. cit.*, 163), JEAFFRESON (*op. cit.*, II, 74, 75), and FRIEDBERG (*op. cit.*, 329):

"On the Justice of Peace's Making Marriages And the Crying Them in the Marcket.

1

Now just as 'twas in Saturn's Reign
The Golden Age is returned again
And Astrea again from heaven is come
When all the Earth by Justice is done.

2

Amongst the rest, we have cause to be glad
Now Marriages are in marckets made
Since Justice we hope will take order there
We may not be cousened no more in our ware

3 and 4

[Indecent stanzas.]

5

So all incommodities would be prevented
And every one would hold them contented,
And all debates in Marriage would cease
When things were done by Justice of Peace.

6

Besides each thing would fall out right
And that old Proverb be verified by't
That Marriage and Hanging both together
When Justice shall have disposing of either.

7 and 8

[Two stanzas with indecent references.]

9

Let Parson and Vicar then say what they will
The Custome is good (God continue it still).
For Marriage being now a Trafique and Trade
Pray where but in Marckets should it be made.

Marriage is made a "traffic" because published in the market-place; "matrimony and hanging" join hands before the same justice; and the "lay register" comes in for his full share of abuse. "Levellers and phanaticks," sadly complains one writer, "blush not at their own rushing into other men's offices,—a bold but witless Justice of y^e^ Peace, makes his neighbouring ministers cyphers, whilst he forceth y^e^ King's subjects (quite against the graine) to elect and he to confirm a mere layman in the office of Parish Register—*Proh pudor fronti enim, nulla fides.*"[1] The recorder of Cirencester in Gloucestershire charges the lack of entries for several years to the account of the act passed by the "Rump," the "said Parliament . . . . consisting of Anabaptists and Independents;"[2] while in 1659, the clerical register of Christ's Church, Hants, spitefully declares that "maryinge by justices, election of registers by Parishioners, and the use of ruling elders, first came into fashion in the time of rebellion, under that monster of nature and bludy tyrant, Oliver Cromwell."[3]

On the other hand the principles of this measure found a mighty champion in Milton, in whose writings, says Friedberg, the religious tendencies of his party were molded almost into a "scientific system."[4] The following extract from "The likeliest means to remove Hirelings out of the Church"

10
Twas well ordain'd they should be no more
In Churches and Chapels then as before
Since for it in Scripture we have example
How buyers and sellers were drov'n out o' th' Temple.

11
Meantime God blesse the Parliament
In making this Act so honestly meant
Of these good marriages God blesse the breed
And God blesse us all, for was never more need."

[1] WOOTTON, *Linc.:* BURN, *Parish Registers*, 26 n. 1. [2] BURN, *op. cit.*, 161.

[3] *Ibid.*, 161. See similar examples in WATERS, *Parish Registers in England*, 18, 19.

[4] FRIEDBERG, *Eheschliessung*, 325; *Geschichte der Civilehe*, 13, 14.

is interesting as epitomizing the views of the Independents, showing that they were grounded upon the fundamental principles of Old English custom:

"As for marriages, that ministers should meddle with them, as not sanctified or legitimate without their celebration, I find no ground in scripture either of precept or example. Likeliest it is (which our Selden hath well observed l. II, c. 58, ux. Eb.) that in imitation of heathen priests, who were wont at nuptials to use many rites and ceremonies, and especially, judging it would be profitable, and the increase of their authority, not to be spectators only in business of such concernment to the life of man, they insinuated that marriage was not holy without their benediction, and for the better colour, made it a sacrament; being of itself a civil ordinance, a house hold contract, a thing indifferent and free to the whole race of mankind, not as religious, but as men: best, indeed, undertaken to religious ends, and, as the apostle saith, I Cor. VII., 'in the Lord.' Yet not therefore invalid or unholy without a minister and his pretended necessary hallowing, more than any other act, enterprise, or contract of civil life, which ought all to be done also in the Lord and to his glory: all which, no less than marriage, were by the cunning of priests heretofore, as material to their profit, transacted at the altar. Our divines deny it to be a sacrament; yet retained the celebration, till prudently a late parliament recovered the civil liberty of marriage from their encroachment, and transferred the ratifying and registering thereof from the canonical shop to the proper cognizance of civil magistrates."[1]

[1] MILTON, *Prose Works* (Bohn, 1848), III, 21, 22. This volume contains a series of discussions on marriage and divorce, which together embody all the learning which the Puritan could produce in support of his theories: *The Doctrine and Discipline of Divorce; The Judgment of Martin Bucer; Tetrachordon; Colasterion*, etc.

Milton does not anywhere discuss the *form* of solemnization (*cf.* FRIEDBERG, *op. cit.*, 327, note). In his "Exposition on Places of Scripture which treat of Marriage" (*Works*, III, 341-46), after considering the definitions given by many writers,

After the Restoration, though not expressly repealed, the act of Cromwell was at once superseded by the laws in force before the Revolution. The more revengeful faction of the royalists even strove to have all marriages contracted under the act made null and void. But a proposition so monstrous could not prevail; and a statute legalizing civil marriages was passed during the first year of Charles II.[1]

II. FLEET MARRIAGES AND THE HARDWICKE ACT, 1753

In order to understand the cumulative influences which finally in the middle of the eighteenth century produced the next English statute prescribing a definite form for marriages, it will be necessary to point out the anomalies of the old system which during the period between the Restoration and that time led to abuses of a most startling character.

Previous to the reign of William III. only spiritual punishment had been imposed for secret marriages; but under that monarch begins a series of acts which, though chiefly intended as revenue measures, in effect prescribed also temporal penalties. The first of these statutes[2] was that of 1694 which imposed on all marriages a direct tax, graduated according to the rank of the parties. To facilitate the enforcement of the law the clergy were required to keep registers to which the tax collectors should have access. But there were certain churches which had long claimed to be exempt from the episcopal visitations, and therefore they

he produces one of his own. "Marriage," he says, "is a divine institution, joining man and woman in a love fitly disposed to the helps and comforts of domestic life." But he rejects the doctrine of the Fathers and canonists that marriage is a "remedy." The "internal Form and soul of this relation is conjugal love arising from a mutual fitness to the final causes of wedlock, help and society in religious, civil, and domestic conversation, which includes as an inferior end the fulfilling of natural desire, and specifical increase."—*Ibid.*, 342.

[1] 12 C. II., c. 33: *Statutes at Large*, III, 24. *Cf.* FRIEDBERG, *op. cit.*, 330. It is curious to see ASHTON, *The Fleet: Its River, Prison, and Marriages* (London, 1889), 332, referring to this act as designed merely to legalize common law or private marriages before witnesses, making no mention whatever of the act of 1653.

[2] 5 and 6 W. III., c. 21: *Statutes at Large*, III, 358–62.

now claimed to be free from the operation of the statute which had only made the marriage business of their incumbents more profitable by removing competition.[1] A supplementary act was therefore passed in the following year,[2] including such places and requiring that all marriages should be solemnized only after publication of banns or obtaining the bishop's license, under penalty of one hundred pounds for the first and three years' suspension from office for the second violation of the law by any clergyman.[3] But even this measure was inadequate. It had not been foreseen that there were clergymen not comprehended under the titles "parsons, vicars, and curates" enumerated in the statute. These were actually benefited by the act.[4] By connivance on the part of the regular clergy such ministers were able to evade the law. They "do substitute and employ," runs the act of 1696, "and knowingly and wittingly suffer and permit, diverse other Ministers to marry great Numbers of Persons in their respective Churches and Chapels without Publication of Banns or Licenses of marriage first had and obtained; many of which Ministers so substituted, employed, permitted and suffered to marry, as aforesaid, have no Benefices or settled Habitations, and are poor and indigent, and cannot easily be discovered and convicted of the Offences aforesaid: And whereas Ministers,

[1] It should be remembered that even in case of the secret or irregular marriages the priest often officiated. The great object was to avoid publicity. Hence churches which were or claimed to be free from the visitations or oversight of the bishop allowed marriage without banns or license. This became a lucrative source of revenue. For example, in the church of St. James, Duke's Place, between 1664 and 1691, about forty thousand marriages were thus celebrated; and many were celebrated at Trinity Minores: BURN, *Fleet Marriages*, 2-5; *idem*, *Parish Registers*, 146; FRIEDBERG, *Eheschliessung*, 332-35. *Cf.* also JEAFFRESON's chapter on "Prisons and 'Lawless' Churches," in *Brides and Bridals*, II, 115-21.

[2] 6 and 7 W. III., c. 6, § 52: *Statutes at Large*, III, 370. *Cf.* HAMMICK, *Marriage Law of England*, 10; also JEAFFRESON's chapter on "Taxes on Celibacy," *op. cit.*, II, 78 ff., and 131 ff., 167 ff.

[3] Violations of the law did not, however, invalidate the marriage: LECKY, *England in the 18th Century*, I, 531.

[4] *Cf.* JEAFFRESON, *op. cit.*, II, 168, 169.

being in Prison for Debt or otherwise, do marry in the said Prisons, many Persons resorting thither for the Purposes aforesaid, and in other Places for Lucre and Gain to themselves,"[1] therefore the one hundred pounds' penalty prescribed in the former statute is extended to these cases,[2] and a fine of ten pounds is imposed on every man married without banns or license.

The last paragraph of the above quotation is interesting as being perhaps the first statutory reference to the celebrated "Fleet" marriages, which constitute one of the most astonishing chapters that the history of ecclesiastical administration can produce. The Fleet, as is well known, was the prison in which formerly all prisoners for debt from the entire kingdom were, or could demand to be, confined. On account of the scant accommodation for the vast number congregated there, it became customary to allow those who could give security for appearance in the prison when summoned to take private lodgings or set up a private establishment anywhere within the "rules of liberties" of the Fleet—a portion of London of considerable area and well defined limits.[3] The Fleet had a chapel with a regular chaplain of its own, who sometimes eked out his income through fees for fraudulent and clandestine marriages.[4] But

[1] Extract from 7 and 8 W. III., c. 35: *Statutes at Large*, III, 422.

[2] "But this penalty was not renewed at each violation of the act, and the offender was able by a writ of error to obtain a delay of about a year and a half, during which time he carried on his profession without molestation, made at least 400 l. or 500 l. and then frequently absconded."—LECKY, *Hist. of Eng. in the 18th Century*, I, 533; *cf.* BURN, *Fleet Marriages*, 6.

[3] For full details as to the history of the Fleet, see ASHTON, *The Fleet: Its River, Prison, and Marriages*, especially 233 ff., 237 ff., 331 ff. "The rules of liberties of this comprehend all Ludgate-Hill to the Old Bailey on the north side, and to the Cock-alley on the south; both sides of the Old Bailey to Fleet-lane; all Fleet-lane and the east-side of the marcket, from Fleet-lane to Ludgate Hill."—HARRISON, *New and Universal Hist. of London* (London, 1776), II, 447; FRIEDBERG, 336 n. 4. *Cf.* also JEAFFRESON, *op. cit.*, II, 122 ff.

[4] BURN, *op. cit.*, 7, 8; ASHTON, *op. cit.*, 332, 338; TEGG, *The Knot Tied*, 202. These chaplains "of course, married people after publication of banns in their own chapels according to law;" and doubtless some of the weddings before them were entirely

here were confined among others many clergymen, some of whom made a regular business of celebrating marriages; and they had to compete with other parsons, often disreputable men, perhaps deprived of their places or benefices for misconduct, who took up their abode in the precincts of the Fleet to gain a living from the disgraceful traffic in matrimony. Even laymen may have sought a share in the profits; and these, like the others, did not fail to wear the priestly "cassock, gown, and bands,"[1] in order to impose upon the unwary. The ceremony was not performed in church, but in the private rooms of the parson. Often an office or marriage shop was opened and a big sign-board hung out announcing the business and commending the quality of service rendered within,[2] while standing advertisements were

respectable. Such was probably the marriage in the Fleet of George Lester and Mistress Babbington as early as 1613: BURN, *op. cit.*, 5; ASHTON, *op. cit.*, 335, 338; TEGG, *op. cit.*, 199. But in these chapels as well as out of them clandestine marriages were solemnized. Here is an example from the *Original Weekly Journal* of Sept. 26, 1719: "One Mrs. Anne Leigh, an heiress of £200. per annum and £6000. ready cash, having been decoyed away from her friends in Buckinghamshire, and married at the Fleet chapel against her consent; we hear the Lord Chief Justice Pratt hath issued out his warrant for apprehending the authors of this contrivance, who had used the young lady so barbarously, that she now lyes speechless."—BURN, *op. cit.*, 7 n. 2; also ASHTON, *op. cit.*, 338, 339. Celebration in the Fleet chapel, not elsewhere, was put an end to by the act of 10 Anne, c. 19. *Cf.* HAMMICK, *The Marriage Law of England*, 11; BURN, *op. cit.*, 8.

[1] ASHTON, *op. cit.*, 340.

[2] The following is a copy of the "hand-bill" of Peter Symson taken from BURN'S *Fleet Marriages*, 54:

> G. R.
> At the true Chapel
> at the old red Hand and Mitre, three doors from Fleet Lane
> and next Door to the White Swan;
> Marriages are performed by authority by the Reverend Mr.
> Symson educated at the University of Cambridge, and late
> Chaplain to the Earl of Rothes.
> N.B. Without Imposition

Symson, as he says, was not a prisoner. Like "many of his fellows," he was witness in a bigamy trial in 1751. He was asked: "Why did you marry them without license?"

"*Symson*—Because somebody would have done it, if I had not. . . . . Never had

also kept in the newspapers. The following notice of his business by parson Lando is quoted by Friedberg from the *Daily Advertiser*, 1749:

"Marriages with a Licence, Certificate and a Crown Stamp, at a Guinea, at the New Chapel, next door to the China Shop, near Fleet Bridge, London, by a regular bred Clergyman, and not by a Fleet Parson as is insinuated in the public papers; and that the Town may bee freed mistakes, no Clergyman being a prisoner in the Rules of the Fleet dare marry; and to obviate all doubts, this chapel is not in the verge of the Fleet, but kept by a Gentleman who was lately Chaplain on board one of his Majesty's men-of-war, and likewise has gloriously distinguished himself in defence of his King and Country, and is above committing those little mean actions that some men impose on people, being determined to have every think conducted with the utmost decency and regularity, such as shall be always supported in law and equity."[1]

Pennant, in his *Account of London*, written "at the end of the last century," gives us a realistic picture of the Fleet parson. "In walking along the street, in my youth, on the side next to the prison, I have often been tempted by the question, *Sir, will you be pleased to walk in and be married?* Along this most lawless space was hung up the frequent sign of a male and female hand conjoined, with, *Marriages performed within*, written beneath. A dirty fellow invited you in. The parson was seen walking before his shop; a squalid profligate figure, clad in tattered plaid night gown, with a

a benefice in my life. I have had little petty curacies about £20 or £30 per year. I don't do it for lucre or gain.

"*Court*—You might have exposed your person had you gone on the highway, but you'd do less prejudice to your country a good deal. You are a nuisance to the public; and the gentlemen of the jury, it is to be hoped, will give but little credit to you."—BURN, *op. cit.*, 55; ASHTON, *op. cit.*, 357, 358. On Symson (or Symsen) see also JEAFFRESON, *op. cit.*, II, 152.

[1] FRIEDBERG, *op. cit.*, 341; quoted also by ASHTON, *op. cit.*, 359; and BURN, *op. cit.*, 59.

fiery face, and ready to couple you for a dram of gin, or roll of tobacco."[1]

Moreover, various taverns, for the sake of the profit derived from the festivities connected with weddings, kept salaried Fleet parsons or others in their employ and made announcement of this extra accommodation also by a sign containing the businesslike inscription: "Marriages performed here."[2] Literally thousands of marriages were celebrated by Fleet parsons every year. A single priest, John Gainham,[3] between the years 1709 and 1740, during which he was confined, "solemnized" thirty-six thousand marriages, though he had many competitors.[4] Not only the Fleet pris-

[1] PENNANT, *Some Account of London* (3d ed., 1793), 232; ASHTON, *op. cit.*, 344; also in BURN, *op. cit.*, 16, note.

[2] LECKY, *Eng. in 18th Century*, I, 5-31; BURN, *op. cit.*, 8; FRIEDBERG, *op. cit.*, 341, who quotes the following from the *Weekly Journal*, 1723, June 29: "Several of the above mentioned brandy-men and victualers keep clergymen in their houses at 20 shillings per week each, hit or miss, but its reported that one there will stoop to no such low conditions, but makes at least 500 pounds per annum of Divinity-jobs after that manner." *Cf.* also TEGG, *The Knot Tied*, 205, note, for the same extract.

[3] John Gainham, the "wrynecked parson," as he is frequently called in the contemporary newspapers, rejoiced in the significant title of "Bishop of Hell." When asked by an advocate whether he was "not ashamed to come and own a clandestine marriage in the face of a court of justice," he blandly replied: *Video meliora, deteriora sequor.* The following lines from the "Morning Walk, 8°, 1751" (BURN, *Parish Registers*, 155), may be compared with similar lines reprinted by ASHTON (*op. cit.*, 345, 346):

"Where lead my wand'ring footsteps now? the *Fleet*
Presents her tatter'd sons in Luxury's cause:
Here venerable *Crape* and scarlet Cheeks,
With nose of purple hue, high eminent
And squinting leering looks, now strike the eye.
B-sh-p of Hell, once in the precincts call'd
Renown'd for making thoughtless Contracts, here
He reign'd in bloated reeling majesty
And passed in Sottishness and Smoke his time—
Rever'd by *Gins* adorers, and the tribe
Who pass in brawls, lewd jests, and drink, their days,
Sons of low, groveling riot and debauch.
Here Cleric grave from *Oxford* ready stands
Obsequious to conclude the Gordian knot,
Entwin'd beyond all dissolution sure;
A Reg'lar this from *Cambridge;* both alike
In artful Stratagem to tye the noose,
While women 'Do you want the Parson?' cry."

[4] On Gainham see BURN, *Parish Registers*, 155, 156; *idem*, *Fleet Marriages*, 49-53; ASHTON, *The Fleet*, 344-47; FRIEDBERG, *Eheschliessung*, 339, 340; JEAFFRESON, *Brides and Bridals*, II, 151.

oners and the lower classes of the city, but many persons of noble titles and illustrious names are enumerated among their customers.[1] The question naturally arises: What were the causes of this singular phenomenon? There were several inducements to the patronage of Fleet parsons, chief of which were the superior cheapness and avoidance of publicity.[2] Smaller fees and no banns were required. Besides parental consent, which was indispensable for minors in regular marriages, was unnecessary in the Fleet. Moreover, it was a popular error of the times that a woman by marriage ceased to be liable for debts previously contracted.[3]

[1] LECKY, *op. cit.*, I, 532. See the examples in FRIEDBERG, *op. cit.*, 343, extracted from BURN, *Fleet Marriages*, 94 ff.; JEAFFRESON, *op. cit.*, II, 174, 175; and ASHTON, *op. cit.*, 381, 361, 387. Even Lord Chancellor Ellesmere and Sir Edward Coke, Chief Justice of England, had contracted secret marriages: FRIEDBERG, *op. cit.*, 344; citing MACQUEEN, *Treatise of Marriage, Divorce*, &c. (London, 1860), 6.

[2] There seems to have been much dislike for the publicity of banns even on the part of the aristocracy: see the letter of Horace Walpole to Henry Seymour Conway, May 24, 1753, *Letters*, II, 334–36; FRIEDBERG, *Eheschliessung*, 342; *idem*, *Geschichte der Civilehe*, 15; FRY, *Considerations on . . . . Clandestine Marriages*, 8.

[3] "Therefore there were in the Fleet a number of men who placed themselves at the disposal of female prisoners for marriage; as Armstrong, who, within fourteen months, married four women, and, as an entry in the register reads, received eight shillings 'for his trouble.'"—FRIEDBERG, *Eheschliessung*, 342. GALLY, *Some Considerations upon Clandestine Marriages* (London, 1750), 14–16, appears to believe that women could thus escape their debts. *Cf.* NORTON, *Die Frauen in England* (Berlin, 1855), 267; and BURN, *Fleet Marriages*, 83.

With this should be compared the companion error that a man is not liable for his bride's debts if he takes her only in her "smock" or "shift": BURN, *Parish Registers*, 153, 154, note; ASHTON, *The Fleet*, 386, 387; *idem*, *Social Life in the Reign of Queen Anne*, 41; and further notices of "smock marriages" in BRAND, *Popular Antiquities*, III, 205, 380; *Notes and Queries*, 1st series, VI, 485, 561; VII, 17, 84; TEGG, *The Knot Tied*, 299–301; WOOD, *The Wedding Day*, 115, 116; and RADCLIFFE, *The Parish Registers of St. Chad, Saddlworth*, 58.

"Another error, common amongst the lower orders, is, that a man may lawfully sell his wife to another, provided he deliver her over with a halter about her neck.—And another, that a woman's marrying a man under the gallows, will save him from the execution. 'While we lay here (New York, A. D. 1784), a circumstance happened which I thought extremely singular. One day, a malefactor was to be executed on a gallows, but with a condition that if any woman, having nothing on but her shift, married the man under the gallows, his life was to be saved. This extraordinary privilege was claimed, a woman presented herself, and the marriage ceremony was performed' (*Life of Oulandah Equiano*, vol. ii, p. 224).—If this took place, our American cousins must have jumbled the two popular errors together."—BURN, *Parish Registers*, 154, note. *Cf.* BRAND, *op. cit.*, III, 379; also BARRINGTON, *Observations on Our Ancient Statutes*, 475, who traces the error to the ancient right of the woman to "appeal" for murder of her husband.

As a matter of course, frightful abuses grew out of this system. Registers were kept, but they were often falsified and were of little value as evidence. False oaths by the score were taken by parsons.[1] Young girls were abducted and carried before some clerical scoundrel of the Fleet and forcibly married for the sake of the fees.[2] Persons were enticed by "plyers" or touts[3] into ale-houses, made drunk, and married while in this condition.[4] Of course, now and then a case of unusual flagrancy attracted the attention of the public, and the criminals were brought to justice. But it is a sad commentary on the moral debasement and utter formalism of the English church during the first half of the eighteenth century that no serious attempt seems to have been made to deprive these monsters of their priestly character. The existing civil laws were powerless to remedy the evil. The Fleet parson could practically bid them defiance.[5] In the lively words of Friedberg, "what could befall him according to existing legislation? Ought the bishop to

[1] Marriages were often antedated (see especially the case of John Mottram, 1717: BURN, *Fleet Marriages*, 11, 12, note; ASHTON, *The Fleet*, 343, 344; FRIEDBERG, *Eheschliessung*, 337; TEGG, *The Knot Tied*, 204); and false oaths were common. The notorious parson Walter Wyatt complains that "if a clark or plyer tells a lye, you must vouch it to be as true as ye Gospel; and if disputed, you must affirm with an oath to ye truth of a downright damnable falsehood.—Virtus laudatur & alget."—BURN, *op. cit.*, 7; ASHTON, *op. cit.*, 337. The *Grub Street Journal*, July 20, 1732, says: "On Saturday last a Fleet parson was convicted before Sir Ric. Brocas of forty-three oaths, (on the information of a plyer for weddings there) for which a warrant was granted to levy *4l. 6s.* on the goods of the said parson; but, upon application to his Worship, he was pleased to remit *1s.* per oath; upon which the plyer swore he would swear no more against any man upon the like occasion, finding he could get nothing by it."—BURN, *op. cit.*, 7 n. 1; also in ASHTON, *op. cit.*, 338.

[2] In 1690 James Campbell, brother of the Duke of Argyle, caused to be abducted and then married Mrs. Wharton. For managing this abduction Sir John Johnston was executed at Tyburn: this case is in *Reports of the Historical Manuscripts Commission*, V, 380, XIII, App. V, 217. *Cf. ibid.*, IV, 345, for a case of abduction in Ireland, 1801.

[3] On the tout or plyer see BURN, *op. cit.*, 7, *passim*; ASHTON, *op. cit.*, 337, 338, 344, 350, 357; JEAFFRESON, *op. cit.*, II, 142, 143.

[4] LECKY, *Eng. in 18th Cent.*, I, 532; FRIEDBERG, *op. cit.*, 339, note.

[5] Occasionally someone was committed for complicity in procuring Fleet marriages: see cases in ASHTON, *op. cit.*, 379, 380; and at least one Fleet marriage was declared illegal: *General Evening Post*, June $\frac{27}{29}$, 1745: ASHTON, *op. cit.*, 382.

remove him from office? That had already occurred when he was dragged from his living to prison. Ought his spiritual superior to have him locked up? He was already a prisoner. Should he be mulcted in a sum of money? He had none."[1]

There were also other places in which the same irregularities existed.[2] Among these were Tyburn, the Tower,[3] the King's Bench prison, and a chapel in Mayfair. In the latter place Rev. Alexander Keith, whom Horace Walpole styles the "marriage broker,"[4] performed each year on the average six thousand marriages, while in the neighboring church of St. Anne only fifty regular contracts were solemnized. We can easily credit the statement that he derived therefrom a "very bishopric of revenue."[5] When finally the Hardwicke act put an end to his traffic, he declared, with many oaths, that he would not be outdone by the bishops, but would buy a piece of ground and "under-bury them."[6] Keith himself has left behind what Ashton thinks is a "plain unvarnished tale" of Fleet marriages. In a pamphlet written at the time Lord Hardwicke's act was under discussion he says: "As I have married many thousands, and, consequently, have on these occasions seen the humour of the lower class of people, I have often asked the married pair how long they had been acquainted; they would reply, some more, some less, but the generality did not exceed the acquaintance of a week, some only of a day, half a day, etc. . . . . Another

[1] FRIEDBERG, *op. cit.*, 337. See similar remarks in GALLY, *Considerations upon Clandestine Marriages*, 28, 29.

[2] See the names of several places in BURN, *Parish Registers*, 146.

[3] Laud had put an end to these irregular marriages in the Tower. At his trial in 1644 he was for this accused of interfering with popular liberty, and ably defended himself by showing the legality of his action: JEAFFRESON, *op. cit.*, II, 116, 117; BURN, *op. cit.*, 145 n. 2.

[4] *Letters of Horace Walpole*, II, 337 (Letter to George Montagu, Esq.).

[5] LECKY, *Eng. in 18th Cent.*, I, 531; FRIEDBERG, *op. cit.*, 344; KNIGHT, *Hist. of England*, V, 586; *cf.* BURN, *Fleet Marriages*, 143.

[6] *Letters of Horace Walpole*, II, 337; BURN, *op. cit.*, 145, note; LORD MAHON, *Hist. of England* (New York, 1849), II, 280. On Keith see BURN, *op. cit.*, 141-45; JEAFFRESON, *op. cit.*, II, 158 ff.

inconvenience which will arise from this Act will be, that the expence[1] of being married will be so great, that few of the lower class of people can afford; for I have often heard a Flete parson say, that many have come to be married when they have but half-a-crown in their pockets, and sixpence to buy a pot of beer, and for which they have pawned some of their cloaths. . . . . I remember once on a time, I was at a public house at Radcliffe, which was then full of Sailors and their girls, there was fiddling, piping, jigging, and eating; at length one of the tars starts up" and swore he would "be married just now," with a rough jest. "The joke took, and in less than two hours ten couple set out for the Flete. I staid their return. They returned in coaches; five women in each coach; the tars, some running before, others riding on the coach box, and others behind. The Cavalcade being over, the couples went up into an upper room, where they concluded the evening with great jollity. The next time I went that way, I called on my landlord and asked him concerning this marriage adventure: he at first stared at me, but, recollecting, he said those things were so frequent, that he hardly took any notice of them; for, added he, it is a common thing, when a fleet comes in, to have two or three hundred marriages in a week's time, among the sailors."[2]

[1] Not the least evil connected with the Fleet marriages was the promotion of unions between the indigent and those morally unfit for the marriage relation: see Bond's speech on the Hardwicke act, COBBETT, *Parliamentary History*, XV, 46, 47. But, of course, as Ashton suggests, the lighter expense may have induced respectable people to seek the Fleet parson, or otherwise to marry privately. "A public marriage had come to be a very expensive affair. There was a festival, which lasted several days, during which open house had to be kept; there were the marriage settlements, presents, pin money, music, and what not."—ASHTON, *The Fleet*, 333, 334, who also quotes Misson's description of a private marriage in the time of William III. For Misson's account, see also JEAFFRESON, *op. cit.*, II, 109 ff.

In his speech against the Hardwicke act Mr. Nugent, to show how "fond our people are of private marriages, and of saving a little money," says that in a year six thousand were married in Keith's Chapel as against fifty in the neighboring St. Anne's Church, in a populous parish and convenient for private marriages by license, though the difference in expense was only 8 or 10 shillings: COBBETT, *Parliamentary History*, XV, 19; *cf. ibid.*, 41.

[2] KEITH'S *Observations on the Act for Preventing Clandestine Marriages:* ASHTON, *The Fleet*, 363, 364; also in BURN, *Fleet Marriages*, 144, 145.

Several other interesting descriptions of these disgraceful "operations" have been handed down. Such are the sprightly verses entitled the "Bunter's Wedding;"[1] and especially the realistic account of the abduction of her friend given by an anonymous writer in the *Grub Street Journal* for January 15, 1735.[2] But the most eloquent testimony of all is afforded by the Fleet registers, many of which are still preserved.[3] The notes appended to the entries are at once amusing and very suggestive. The following examples are selected from Burn:

"N. B. they had liv^{d} together 4 years as man and wife: they were so vile as to ask for a Certifycate to be antidated."

"Quarrelsome people."

"N. B. they wanted an antidate from 45 to 41."

"N. B. Both y^{e} man and woman were exceeding vile in their behaviour."

"N. B. the woman was big wth child, and they wanted a Certifycate antidated; and because it was not comply'd with, they were abusive wth a Witness."

"N. B. the person belonging to y^{e} house aloud me only 2^{s} out of 8^{s}."

"Had a noise foure hours about the money."

"N. B. stole a silver spoon."

"Stole my cloathes brush."

"The person who was with them I believe knew it to be a made marriage."

"Her eyes very black, and he beat about y^{e} face very much."

[1] This "poem," in twenty eight-line stanzas, is given by ASHTON, *op. cit.*, 369–72.

[2] Quoted by BURN, *Fleet Marriages*, 14, 15, note; ASHTON, *op. cit.*, 372–75; also by FRIEDBERG, *Eheschliessung*, 338, 339, note; and JEAFFRESON, *op. cit.*, II, 176, 177.

[3] On the preservation of the Fleet registers see ASHTON, *op. cit.*, 382–88; BURN, *op. cit.*, 66 ff.; HAMMICK, *Marriage Law*, 11, 12; and WHITAKER, in the *Cornhill Magazine*, May, 1867. By 3 and 4 Vict., c. 92, the Fleet and Mayfair registers, twelve hundred books of various sizes, are deposited in the office of the registrar-general at Somerset House (HAMMICK, *op. cit.*, 12).

"The woman ran across Ludgate Hill in her shift. 10s."[1]

"N. B. A coachman came and was half married, and wou'd give but 3s 6d and went off."[2]

Long before the middle of the eighteenth century it is very clear there was crying need of thoroughgoing reform in the marriage laws of England. To the surviving disorders arising in mediæval theory had come new ones of more modern growth. For, besides the shameful irregularities of the Fleet, clandestine contracts, either through the help of "hedge parsons"[3] or else by simple agreement of the parties, illegal but not invalid, were still freely practiced throughout the kingdom. From 1666 onward during the seventeenth and eighteenth centuries efforts were repeatedly made to provide a remedy by legislation; but no bill succeeded in passing both houses of Parliament.[4] The

[1] An example of the "smock" marriage; see p. 441 n. 3, above.

[2] For these entries see BURN, *Parish Registers*, 153–55; and there are many others in *idem*, *Fleet Marriages*, 73 ff.

[3] HAMMICK, *Marriage Law of Eng.*, 11.

[4] See the chronology of these bills to prevent clandestine marriages in FRIEDBERG, *Eheschliessung*, 346–48; and compare BURN, *Fleet Marriages*, 11 ff. Three of them introduced respectively in 1677, 1685, and 1691, may be found in the *Reports of the Historical Manuscripts Commission*, IX, App. II, 91–99; XI, App. II, 276–80; XIII, App. V, 253 ff. The first declares that "notwithstanding all provisions by law . . . . several minors have . . . . been clandestinely married without consent of parents, and other irregular marriages have been made;" therefore it is enacted that it "shall not be in the power of any son, being under the age of twenty-one years, nor . . . . of any daughter . . . . under . . . . eighteen, to marry . . . . or to make a matrimonial contract of any kind whatsoever;" except the father or guardian "shall have given consent in writing attested by two credible witnesses at the least, ... or shall be present and consenting thereto," under penalty of nullity of the marriage. After the death of father and mother, the same restriction is put upon the contracts of males under eighteen and females under fourteen without the guardian's consent. "If any guardian shall be privy to any such pretended marriage," he shall lose "all his right, title, and interest to the custody of any such minors" and "shall also forfeit one moiety of his whole estate, both real and personal," one-half to the king and the other to the informer. If "any domestic or menial servant shall make any pretended marriage or matrimonial contract" with "any of the children or pupils of his or her mistress during their minority, and in such manner as . . . . is by this act declared to be . . . . null and void," such servant shall suffer three years' imprisonment. "Every ecclesiastical person who celebrates such a marriage or any marriage whatsoever whereof the banns had not been published as required by the ecclesiastical law, shall be adjudged deprived ipso facto of all benefices, dignities, pensions, and spiritual promotions which he

legislation of William and Anne, already referred to, proved an encouragement rather than a hindrance to clandestine unions. The rivalry of the prisons, "lawless" churches, and the regular Fleet chaplain was thus removed; conviction for breach of the statutes was rendered exceedingly difficult; and the increased expense caused by the tax upon licenses favored the business of parsons who were ready to "solemnize" marriages at low rates and without troublesome or costly conditions.[1] Even the notorious cases of Haagen Swendsen in 1702 and "Beau" Feilding in 1706, though calling sharp attention of the public to the frightful dangers lurking in the matrimonial laws, were not enough to quicken the conscience of the nation.[2] A timely edition of Dr. Gally's sensible book[3] in 1750 did something to

had at time of such offence or at any time after." Personating a priest in such cases is constituted felony without benefit of clergy, punishable by death. For violating the act in the issue of a license, the offender shall forfeit his office and be incapable of holding office in church or state. The bill of 1691 is very similar in its provisions.

[1] The evil results of these blundering statutes are vigorously stated by JEAFFRESON, *Brides and Bridals*, II, 167 ff., 130 ff., 84. The effects of 7 and 8 W. III., were especially bad. Before its enactment "it was in the power of any rogue married at a tavern-wedding to inform against the officiating clergyman, without rendering himself liable to punishment for his part in the irregular transaction. Any clerk or other person who assisted at a marriage without license or banns, could also with impunity turn informer against the lawless priest;" but by placing a penalty on all these persons "the mouths of individuals who were best qualified and most likely to give conclusive evidence against the peccant clergyman" were closed: *ibid.*, 170, 171.

[2] For these cases see HOWELL, *State Trials*, XIV, 559 ff., 1327 ff. The facts are summarized by FRIEDBERG, *Eheschliessung*, 344-46. The case of "Barbara late Dutchess of Cleaveland" against Feilding, with much concerning Feilding's other adventures, may be found in *Cases of Divorce for Several Causes* (London, 1715). Elopement with heiresses is discussed by ASHTON, *Social Life in the Reign of Queen Anne*, I, 29 ff. Of Haagen Swendsen, "who was, in 1702, convicted and executed for stealing Mrs. Rawlins," he says: "Nowadays, he would have been unhesitatingly acquitted, even if he had ever been presented, as there was no real case against him, and Mrs. Rawlins married him of her own free will."

In the *Report of the Royal Commission, 1868*, xxi-xxiii, it is estimated that one-third of all the marriages in the eighteenth century were "irregular;" whereas, after 1834, when the ministers of all denominations could solemnize, irregularity became a "stigma," the number of such contracts now (1868) being in the ratio of 1 to 1,000.

[3] GALLY, *Some Considerations upon Clandestine Marriages* (2d ed., London, 1750). The first edition of this work appeared in 1730. It is strong evidence of the slow

educate the public mind; and finally in 1753 the celebrated case of Cochrane *v.* Campbell,[1] originating in Scotland, came in the last instance before the House of Lords. The validity of a marriage which had been legally celebrated and which had continued for nearly thirty years was challenged on account of previous secret *sponsalia de praesenti.* Save for lack of evidence of the alleged prior contract, "the wife who in true love during so long a time had been devoted to her husband, though already dead," would have been "degraded to the position of a concubine, the children begotten in marriage branded as bastards, and robbed of their inheritance."[2] This case proved to be the proximate cause of the passage of the famous Hardwicke act of 1753. On January 31 of that year, on motion of Lord Bath, the House of Lords decided to bring in a "Bill for the better preventing of Clandestine Marriage." The drafting of the bill was intrusted to the twelve judges, but the draft presented by them was so imperfect, that the chancellor, Lord Hardwicke, undertook its thorough revision.[3]

With little resistance the revised bill was readily passed

progress of opinion on social questions that, a century after the enlightened legislation of Cromwell, the author should have found it necessary to enter into an elaborate argument to establish the right of the state to make the observance of prescribed forms and conditions essential to a valid marriage. Sec. i assigns "some general reasons for a law to annul clandestine marriages;" sec. ii presents "what the civil law has done on this subject;" sec. iii shows "what has been done in France;" and in sec. iv six objections to the adoption of such a law are answered. Dr. Gally's book was referred to in the debates on the Hardwicke act.

[1] Cochrane *alias* Kennedy *v.* Campbell: PATON'S *Reports of Cases decided in the House of Lords on Appeal from Scotland*, I (1726-57), 519-32; and WILSON AND SHAW'S *Cases*, III, 135, note. The appeal of the claimant was dismissed by the Lords for want of evidence; and only on this ground was that tribunal spared the cruel necessity of declaring void the marriage of persons who for many years had lived together openly as husband and wife. There are notices of the case in WALPOLE, *Memoirs of the Reign of George II.* (2d ed., 1847), I, 336 ff.; COBBETT, *Par. History*, XV, 8; JEAFFRESON, *Brides and Bridals*, II, 181.

[2] FRIEDBERG, *Eheschliessung*, 349. Friedberg states erroneously that the Lords declared the marriage void.

[3] "Lord Bath invented this Bill, but had drawn it so ill, that the Chancellor was forced to draw a new one — and then grew so fond of his own creature, that he has crammed it down the throats of both Houses, though they gave many a gulp before they could swallow it."—WALPOLE to Conway, May 24, 1753: HORACE WALPOLE'S *Letters*, II, 334-36; also in COBBETT, *Parliamentary History*, XV, 33.

through the Lords, the bishops even yielding their assent. But in the Commons it came to its final passage on June 6, 1753, only after a long and stormy contest. The press and the people participated in the excitement;[1] and the tenacity of the old custom of private espousals is shown by the fact that the large majority of the latter were opposed to the measure, though this may in part be accounted for on the ground of its intolerance toward the dissenters. In the lower house the bill was ably supported by Attorney-General Ryder, Lord Barrington, the Earl of Hillsborough, Solicitor-General Murray, and by Mr. John Bond whose speech is remarkable for its strong argument and sober common-sense. Most prominent on the other side were Mr. Nugent, Colonel George Haldane, Charles Townshend, and, in particular, Henry Fox who in 1744 had himself contracted a clandestine marriage in the Fleet with the daughter of the Duke of Richmond.[2] Another bitter antagonist of the bill was Horace Walpole, "two members of whose family were known to have entered matrimony by uncanonical wedlock, and one of whose nieces, several years after the enactment of Lord Hardwicke's Marriage Bill, became the bride of the most famous Fleet marriage on record."[3] The arguments in sup-

[1] For contemporary discussions see *Gentleman's Magazine*, XXIII, 399, 400, 452, 453, 538; XXIV, 145; XXV, 212; *Monthly Review*, XII, 111 ff., 438–46 (notices of various pamphlets including some by Dr. Stebbing); *ibid.*, XIII, 92–95, 394 ff.; XVI, 371; XXXII, 233; XL, 226, 425–56. Compare FRIEDBERG, *Eheschliessung*, 352 n. 1, who gives the titles of several pamphlets relating to the act; MADAN, *Thelyphthora*, II, 38–90, "cannot mention or even think" of it "without indignation," because it "strikes at a divine institution."

[2] BURN, *Fleet Marriages*, 16; TEGG, *The Knot Tied*, 206. For the debates in the Commons see COBBETT, *Parliamentary History*, XV, 2–86; and compare the excellent analysis by FRIEDBERG, *Eheschliessung*, 350–52: also HORACE WALPOLE, *Letters*, II, 334–36; *idem*, *Memoirs of George II.*, I, 336–49; BURN, *Parish Registers*, 32, 33; *idem*, *Fleet Marriages*, 16 ff., 22–31 (entire account of Lord Orford quoted); LECKY, *Eng. in 18th Cent.*, I, 539; *idem*, *Democracy and Liberty*, II, 174–77; SPENCER WALPOLE, *Hist. of Eng.*, IV, 69, 70; KNIGHT, *Hist. of Eng.*, V, 585; LORD MAHON, *Hist. of Eng.*, II, 280–82; HAMMICK, *Marriage Law*, 12, 13; and OPPENHEIM, "Die Verhandlungen des Eng. Parliaments über Einführung der Civil-Ehe," *ZKR.*, I, 9 ff., 14, 15, 20–22.

[3] JEAFFRESON, *Brides and Bridals*, II, 183, 174, 175, note. Royal marriages were not comprehended by the Hardwicke act; hence irregular marriages of royal persons were still legal. On September 6, 1766, in a mansion in Pall Mall, Maria, Countess-Dowager of Waldgrave, niece of Horace Walpole, contracted a clandestine marriage,

port of the measure are direct, practical, and convincing; those of its opposers for the most part, except as directed to faults of detail, seem captious, forced, or even frivolous, when looked at in the light of modern experience. When they saw that the bill was likely to pass, they sought to make it obnoxious by mutilation and amendment.[1]

In favor of the measure the notorious scandals and hardships caused by clandestine contracts are dwelt upon. "How often," exclaims the Attorney-General, "have we known a rich heiress carried off by a man of low birth, or perhaps by an infamous sharper? What distress some of our best families have been brought into, what ruin some of their sons or daughters have been involved in, by such means, every gentleman may from his own knowledge recollect."[2] The bill, it is urged, provides an effective remedy for the evil. This remedy is publicity; and it can be secured only by making banns or license, with parental consent, followed by a solemn public celebration at the proper time and place, the absolute condition of a valid marriage. The practical success of such a system is proved by reference to Dutch experience. For the law of Holland is even stricter than the proposed measure. "In Holland," says Mr. Bond, "a

without witnesses, banns, license, or record, with the Duke of Gloucester, brother of George III. Her private chaplain performed the ceremony; hence, except in form, this was not strictly a Fleet marriage. A few years later, on Oct. 2, 1771, another brother of the king, the Duke of Cumberland, formed a similar irregular alliance with Anne Horton; but in this case there were a witness and a memorandum. Both marriages were declared legal by a special commission: see the chapter of JEAFFRESON, on "Two Royal Marriages," *op. cit.*, II, 234-49.

[1] All the amendments "were designed to aggravate the aversion which the populace had conceived for a measure that appeared to them an attempt to deprive them of cheap and convenient marriage, with a view to preserve the children of the aristocracy from the misfortune of premature and imprudent matrimony. . . . . The main object of the bill was, in the first instance, to abolish the law of matrimonial pre-contract throughout the kingdom." Therefore Henry Fox, to render it unsatisfactory to its promoters and "so ridiculous to the whole country," managed to have Scotland exempted from the operation of the law, although the suit which gave rise to the measure originated there: JEAFFRESON, *op. cit.*, II, 183 ff.; *cf.* BURN, *Fleet Marriages*, 19.

[2] COBBETT, *Par. Hist.*, XV, 3. *Cf.* similar expressions by Mr. Bond, *ibid.*, 41 ff.

regular proclamation of banns . . . . is so necessary, that a marriage without it is absolutely void, without any decree or sentence of any court for declaring it so;" and after publication the parties must be "married in the church or chapel of the religion[1] to which they belong; neither of which can be dispensed with but by the supreme court of Holland with respect to the nobility, or by the supreme magistrate of their city with respect to the other inhabitants; so that . . . . no license can be granted, either as to the proclamation of banns, or as to not being married at church, by any ecclesiastical court whatsoever."[2] Nor does the state overstep its proper authority when a marriage is rendered void for neglect to observe its prescribed forms. No violence is thus done to the "sanctity" of the marriage bond; for the canonical doctrine of the sacramental or indissoluble nature of matrimony is not sustained by an appeal either to history or to common-sense.[3] "I think it is ridiculous to say," declares one speaker, "that infants shall have a power, when they come of age, to avoid and annul every contract they made, while under age, without the consent of their parents

[1] Mr. Bond appears in this statement to be somewhat in error; for optional civil marriage existed in the Netherlands since 1656: see p. 409, above.

[2] Speech of Mr. Bond, in COBBETT, *op. cit.*, XV, 43, 44. Townshend (*ibid.*, 57, 58) replies to the argument based on the laws of the Dutch. The people and the institutions are very different from the English and therefore afford no precedent. "In Holland not only every province but every town is a sort of sovereignty within itself; and their religion, especially with regard to marriage, is much the same as it was in this country in the days of Oliver Cromwell, when neither the marriage contract, nor the ceremony was supposed to have any sanctity or religion in its nature." Then follows this delicious bit of comparison: "The Dutch, sir, are naturally a cool, patient people, and not given to sudden changes, either in their tempers or passions; therefore the rendering a proclamation of banns necessary may do very well in that country; but in this, where the people are naturally sanguine, impatient, and as apt to change as the air they breathe, I am convinced that such a regulation would be the cause of numberless mischiefs."

[3] FOX (COBBETT, *loc. cit.*, 73) deprecates "making so free with the laws of God and nature." See also Nugent (*ibid.*, 12–14) and Beckford (*ibid.*, 82, 83). On the other side, the Earl of Hillsborough asks whether even the "vulgar can believe, that there is anything sacred in a ceremony performed in a little room of an ale-house in the Fleet, and by a profligate clergyman whom they see all in rags, swearing like a trooper and higgling about what he is to have for his trouble, and half drunk at the very time he is performing the ceremony."

or guardians, and yet if without consent of father or mother, or guardian, they dispose of themselves and every thing that belongs to them in marriage whilst under age, they shall have no power to avoid that contract when they come of age, let it be never so fraudulent, pernicious or infamous. This is adding a sanctity to the marriage contract, which is inconsistent with the good of every society, and with the happiness of mankind in general."[1]

On the other side, every merit claimed for the bill by its friends is changed into a fault. The evil of secret espousals is minimized or even denied. Charles Townshend, whose argument is singularly forced and superficial, boldly asserts that "clandestine marriages cannot properly in themselves be called a public evil, and as they are of different kinds, they ought to have a different consideration." There are, he says, four varieties. Those that are equal both as to rank and fortune "cannot be called a public evil, because they are generally the most happy, and such as parents ought to approve of, and would approve of, if not governed by some whim or caprice. . . . . As to those that are unequal with respect to fortune, they are so far from being a public evil, that they are a public benefit, because they serve to disperse the wealth of the kingdom through the whole body of the people, and to prevent the accumulating and monopolizing it into a few hands; which is an advantage to every society, especially a free and trading society. The same may be said of clandestine marriages that are unequal both as to rank and fortune," for they are still more leveling in their effects; as when "a lord of good estate" marries "a taylor's or a shoemaker's daughter of good character, though not

[1] Ryder, in COBBETT, *loc. cit.*, 6, 7. *Cf.* the speech of Lord Barrington, *ibid.*, 27, 28, who thinks the state as much justified in requiring that a marriage to be valid shall depend upon the observance of certain prescribed forms, as it is in demanding that a legally binding oath shall be taken before duly authorized persons. These arguments are criticised by Nugent (*ibid.*, 22, 23) and by Beckford (*ibid.*, 82, 83).

worth a groat," or a "lady of quality, entitled to a good estate," marries such a man's son who is honorable but poor. Such marriages are a public blessing. "Nay I will go farther," he adds, "such marriages seldom, if ever, bring shame or misery upon the contracting parties." Only the secret marriages which are properly called "scandalous and infamous" are a public evil; such as are entered into between a gentleman of character and an abandoned woman, or between a reputable lady and "a notorious rogue or common sharper." But "how rarely do such infamous marriages happen, especially with respect to those under age."[1] In fact, throughout the argument of the opposition every change is rung on the objection that the bill is aristocratic and plutocratic in its motive. Elopement, even through the connivance of a Fleet parson, is practically elevated into the chief security of democracy and the necessary safety-valve of human passion. Should the bill pass and the advantage of secretly contracting a valid marriage be thus taken away, the nobility "will in a great measure secure all the great heiresses in the kingdom to those of their own body. An old miser, even of the lowest birth, is generally ambitious of having his only daughter married to a lord, and a guardian has generally some selfish view, or some interest to serve, by getting his rich ward married to the eldest son of some duke, marquiss, or earl; so that when a young commoner makes his addresses to a rich heiress, he has no friend but his superior merit, and that little deity called love," whose counsel, but for the proposed law, she may harken to in tender youth, but whose influence over her decreases "as she increases in years; for by the time she comes of age, pride and ambition seize possession of her heart likewise;" so that as a result hereafter, if the bill pass, "no commoner will ever marry a rich heiress, unless his father be a minister of state, nor will a peer's

[1] Townshend, in COBBETT, *loc. cit.*, 51–53.

eldest son marry the daughter of a commoner, unless she be a rich heiress."[1] Furthermore, close intermarrying among the rich and noble will cause degeneration. "What sort of breed their offspring will be, we may easily judge: if the gout, the gravel, the pox, and madness are always to wed together, what a hopeful generation of quality and rich commoners shall we have amongst us." Then, too, a social caste will be developed in England, such as the distinction between *noblesse* and *roturiers* abroad, especially in France, where the marriages of the "quality" are something like those of "sovereign princes: the bride and bridegroom sometimes have never seen one another, till they meet to be married;" hence in that country gallantry has taken the place of "conjugal love and fidelity."[2] Nay, the sinister effects of the proposed measure in this regard are not exhausted even by this dark prophecy. Coming to the rescue, another ingenious logician shows conclusively that through the increase of wealth, which means political power, the lords, following the Venetian example, may overmaster the commons, subvert the free constitution, and set up a despotic oligarchy in its place.[3]

But the obstacles placed by the bill in the way of free wedlock will have still other disastrous consequences. Marriage will be discouraged among the lower orders, particularly the industrious poor, while at the same time immorality through illicit unions will be vastly increased. The state will thus suffer through the check put upon the

[1] The bill is to bring upon the people all these evils "that my young lord, or the young rich squire, forsooth, may not be induced to marry his mother's maid, or a neighbouring farmer's daughter, who may probably make him a better wife and render him more happy, than if he had married the richest heiress in the kingdom; or that young miss may not run away with her father's footman, who may make her a better husband, than any lord or rich squire she, or even her father, could have chosen." Such marriages "are rather an advantage than a prejudice to the community."—Nugent, in COBBETT, *loc. cit.*, 20; *cf.* Fox, *ibid.*, 71.

[2] Nugent, in COBBETT, *loc. cit.*, 15, 16; *cf.* the similar argument of Fox, *ibid.*, 68, 69.

[3] Haldane, in COBBETT, *loc. cit.*, 35-39; *cf.* Townshend, *ibid.*, 61.

growth of its best population.[1] For the bill not only places tyrannical power in the hands of parents or guardians by making their consent necessary to a valid marriage,[2] but passionate lovers even when of full age will not wait for the publication of banns, while the poor will be unable to pay for a license.[3] The proposed law, according to Haldane, "will really prove a sort of prohibition of marriage with respect to all our poorer sort of people, because it will render the solemnization of that ceremony so tedious and troublesome, or so expensive, that many of them will chuse to live single, or agree to live together without any marriage at all. We know how averse our people generally are to a proclamation of banns, even in the present method, when in any of our holiday weeks the whole may be performed, and the loving couple made happy . . . . in three or four days; how much more averse, then, will they be in this way of marrying, when they must give a week's notice before the

[1] This argument is also used by a writer in the *Monthly Review*, XL, 425, 426, who makes a violent attack on the bill: "Sir Robert Walpole" is declared to be "the first fool of a statesman who thought a kingdom might be too populous" (426).

Mr. Nugent, in the Commons, appears to think that increase of population among the poor must be promoted at all hazards. Even the judicially enforced marriages between wenches and their reluctant seducers are blessings which he fears the bill will put an end to: COBBETT, *op. cit.*, XV, 18. With these conceits of the opposition compare the sound views of the Earl of Hillsborough (*ibid.*, 63): "Poor servants and labourers . . . . are but too apt to run into matrimony, before they have considered how they are to support either themselves or their children . . . . ; for the prosperity and happiness of a country does not depend upon having a great number of children born, but upon having always a great number well brought up, and inured from their infancy to labour and industry." Essentially modern opinions are likewise expressed by Mr. Bond: "For as to those rash and inconsiderate marriages . . . . between two poor creatures, sometimes before they have got clothes to their backs" or a lodging or means of support, "I think they ought all, if it were possible, to be prevented." Fleet marriages, he believes, have propagated "beggars, rogues, and the most abandoned sort of prostitutes;" and he appeals to the stricter laws of Holland which have not checked the growth of an industrious population: *ibid.*, 46, 47.

[2] A writer in the *Monthly Review*, XII, 115, speaks of the "minor's inalienable right to marriage as the proper remedy for chastity."

[3] According to Mr. Haldane, banns are required by the bill "in order to render licenses necessary; and the only use of a license I take to be that of putting money into the pockets of our clergymen or some of their officers."— COBBETT, *op. cit.*, XV, 40. On the too high cost of licenses *cf.* TOWNSHEND, *ibid.*, 57, 58; and FOX, *ibid.*, 70.

banns can be first proclaimed, and after that must wait above three weeks before the proclamation . . . . can be finished and the marriage ceremony performed?" The natural result will be the increase of sexual vice.[1] Townshend presents a similar argument, though some of his forebodings were fully justified by future events. The bill instead of preventing polygamy—by which he means bigamy—will encourage it; "for it prescribes so many formalities for rendering a marriage good and valid in law, that a cunning fellow will always take care to have some of them omitted," so that he cannot be convicted of a breach of the statute. Marriage will still be difficult of proof; and by encouraging false promises of marriage the bill sets a cruel snare for the feet of the innocent.[2] "As the law now stands, if a treacherous young fellow should refuse to perform such a promise, the young woman who trusted to it may sue him in an ecclesiastical court, where she may put him on his oath, and if he confesses the promise, or she can otherwise prove it, he must either marry her, or be imprisoned upon the writ *de excommunicato capiendo*." But under the proposed act "she can have no relief: the statute of frauds and perjuries will be a bar to her action at common law, unless she has been so cautious as to take a promise in writing; even then, if he was under age, his nonage will be a bar to her action; and suppose him of age"—and here the distinguished member of the House of Commons takes a tone which like a flash reveals the political torpor of the English people and of the Whig oligarchy of George II.—"she must submit to

[1] Haldane, in COBBETT, *loc. cit.*, 39. He continues: "In my opinion the certain consequence will be that of rendering common whoring as frequent among the lower sort of people, as it is now among those of the better sort; and multitudes of wenches in all parts of the country, when they find they cannot get husbands according to law, will set up the trade; so that the Bill ought really to be called a Bill for the increase of fornication in this kingdom."—*Ibid.*, 39. *Cf.* the similar arguments of Nugent (*ibid.*, 17, 18), Townshend (*ibid.*, 55, 58), Fox (*ibid.*, 68-70), and Beckford (*ibid.*, 80-82).

[2] Compare the statements of Nugent, in COBBETT, *loc. cit.*, 21.

have a price put upon her honor and virtue by a jury of tradesmen, few of whom are accustomed to deal in that commodity." But, with Colonel Haldane, he believes, of all the evil consequences of the act "that of preventing marriage and promoting fornication among our industrious poor will be most pernicious."[1] Yet how simple would be the proper remedy[2] for the defects of the present marriage laws!

In concluding the summary of this debate, singularly illustrative of the imaginary evils so often conjured up against reform measures, the deep-seated prejudice of the English people to publicity in matrimonial engagements should be noted. It seems that in 1753, as well as in 1653 and 1836, the open procedure prescribed by the law gave a certain shock to popular sentiment. "It is a peculiar phenomenon," says Friedberg, "that the English nation, whose whole political system is interpenetrated by the principle of publicity, should look upon publicity in the formation of marriage as positively improper; that it should regard the publication of banns . . . . as an unjustifiable violation of modesty."[3] In this spirit Horace Walpole, ridiculing the Hardwicke act, writes to Hon. Seymour Conway: "It is well you are married. How would my lady A— have liked to be asked in a parish-church for three Sundays running? I really believe she would have worn her weeds forever, rather than have passed through so impudent a ceremony."[4]

[1] Townshend, in COBBETT, *loc. cit.*, 55-58.

[2] Banns and license are unnecessary; while clandestine marriages of the "scandalous or infamous" variety are so unimportant as to call for no legislation. Bigamy and the hardships arising in difficulty of proof may be remedied, it is alleged, by a law merely providing for proper registration and making it a rule that the "legitimacy of children should never be questioned, after the death of their parents who lived together as husband and wife, and were generally reputed to be so."—Townshend, in COBBETT, *loc. cit.*, 49, 50. *Cf.* the similar plan of Haldane, *ibid.*, 40, 41.

[3] FRIEDBERG, *Geschichte der Civilehe*, 20, 15.

[4] HORACE WALPOLE, *Letters*, II, 334-36; COBBETT, *op. cit.*, XV, 32, 33.

According to Mr. Nugent, "it is certain, that proclamation of banns and a public marriage is against the genius and nature of our people; it shocks the modesty of a young girl to have it proclaimed through the parish, that she is going to be married; and a young fellow does not like to be exposed so long beforehand to the jeers of all his companions."[1] In fact, without defending banns as an ideal institution, one cannot help reflecting that the final triumph of civil marriage has already done something to overcome the false delicacy touching human sexual relations and responsibilities, whose survival in modern society is nevertheless still a serious hindrance to rational education.

By the statute of 1753,[2] whose origin has now been considered, all marriages, save those of Quakers and Jews or those of members of the royal family, are to be celebrated only after publication of banns or license, and only during the canonical hours[3] in an Anglican church or chapel where "banns of matrimony have been usually published," and before an Anglican clergyman. To solemnize marriage in any other manner or in any other place, or without banns except by special license of the archbishop, is punished with fourteen years' transportation, and the marriage is declared void. Two or more witnesses must be present. The clergy are required to keep registers, and the falsifying or destroying the same is punished by death. In the case of banns

[1] Nugent, in COBBETT, *loc. cit.*, 19. *Cf.* the extracts from the Report of the "Marriage Laws Commission," 1868, in HAMMICK, *Marriage Law*, 354 ff., where the inadequacy of banns and the popular dislike of them are mentioned.

[2] The act of 26 Geo. II., c. 33. For the text, see PICKERING'S *Statutes at Large*, XXI, 124–30; EVANS, *Statutes*, I, 155–60. For analysis and discussion of its provisions see BURN (R.), *Ecclesiastical Laws*, II, 433; HAMMICK, *Marriage Law*, 12–15; GEARY, *Marriage and Family Relations*, 9, 12–15; BURN (J. S.), *Parish Registers*, 32, 33; BLACKSTONE, *Commentaries*, I, 438, 440; IV, 163; LECKY, *Eng. in 18th Cent.*, I, 531–40; *idem*, *Democracy and Liberty*, II, 174, 176 ff.; TASWELL-LANGMEAD, *Eng. Const. Hist.*, 750; CAMPBELL, *Chancellors*, VI, 262; MAY, *Const. Hist.*, II, 362; FRIEDBERG, *Geschichte der Civilehe*, 16, 17; *idem*, *Eheschliessung*, 355–58; OPPENHEIM, "Ueber Einführung der Civil-Ehe in Eng.," *ZKR.*, I, 9–11.

[3] From 8 to 12 in the morning.

the express consent of parent or guardian for the marriage of minors is not required. Such a marriage is legal when dissent has not been expressed.[1] But in the case of license the marriage of a minor—not being a widow or a widower—without the consent of parent or guardian is absolutely void.[2] Furthermore, the act declares that persons convicted of solemnizing "matrimony in prisons and other places without publication of banns or license" shall be judged guilty of felony and sentenced to fourteen years' transportation, while the marriages so solemnized are absolutely null and void. Precontracts are likewise abolished. "In no case whatsoever shall any suit or proceeding be had in any ecclesiastical court in order to compel a celebration of marriage *in facie ecclesiae*, by reason of any contract . . . . whether *per verba de praesenti* or *per verba de futuro*."

The general effect of the Hardwicke act was undoubtedly good. Publicity was secured. "It destroyed the infamous trade of the Fleet Prison and Mayfair parsons;[3] it enforced

[1] *Cf.* HAMMICK, *Marriage Law*, 13. Compare SAYER, *A Vindication of the Power of Society to annull the Marriages of Minors* (1754), 2 ff., who answers the arguments of STEBBING in the works mentioned in Bibliographical Note X. This is important in tracing the rise of sound opinions regarding the proper sphere of social control; and with it may be read to advantage SALMON, *Critical Essay Concerning Marriage*, 59 ff. On the ecclesiastical law as to consent to the marriage of minors see POYNTER, *Doctrine and Practice of the Ecc. Courts*, 29 ff.; and in this connection may also be read COOKE, *Report of the Case of Horner against Liddiard upon . . . . Consent nec. to the mar. of illegit. Minors* (London, 1800).

[2] The clause of the act providing for license is vigorously attacked by FRY, *Considerations on the Act*, 7 ff., who declares that "it gives liberty (for a little money) to revive Clandestine Marriages." On the spiritual law as to license compare POYNTER, *Doctrine and Practice of the Ecc. Courts*, 21 ff.

[3] The act took effect on March 25, 1754; and between its passage on June 6 and that date these parsons did a roaring good business. The *Gentleman's Magazine*, XXIV, 141 (Sunday, March 24, 1754), has the following:

"Being the last day before the commencement of the marriage act before 11 o'clock 45 couple were married at Mr. Keith's chapel, and when they ceased, near 100 pair had been joined together; two men being constantly and closely employed in filling up licenses for that purpose." See Keith's appeal for charity, because the act had reduced him "from a great Degree of Affluence" to "such a deplorable state of misery in the Fleet Prison," in ASHTON, *The Fleet*, 364, 365.

Clandestine contracts, however, were not entirely put an end to by the Hardwicke act. In the Savoy chapel Dr. John Wilkinson and his representatives solem-

a regular public celebration after compliance with certain preliminary forms," and it established the principle of parental consent "as evidenced by oath in case of a license, and by the absence of any expression of *dissent* in the case of banns;" and "from this date verbal contracts of matrimony ceased to have any binding effect in England; solemnization could not be enforced, and damages for breach of promise, recoverable by action, became the only relief in such cases."[1]

III. THE PRESENT ENGLISH LAW

There were, however, serious defects in the act of 1753. It was conceived in a spirit of bigoted intolerance toward Roman Catholics and all dissenters—save only Jews and Quakers—who were thus forced against their consciences to accept the rites of the established church; and the law was far too rigid in matters of detail. The harsh treatment of dissenters is all the more remarkable because "their privileges were abridged" by the act; for previous to 1753 they had been at liberty to celebrate their marriages in their own chapels, without submitting to the ritual of the "church."[2] It is significant that in the report of debates on the measure collected in the *Parliamentary History* not a single voice seems to be raised in favor of the general

nized many hundreds of marriages contrary to the provisions of the law; but these were, of course, absolutely void: JEAFFRESON, *Brides and Bridals*, II, 192-202; BURN, *Fleet Marriages*, 139-41. Burn is in error when he says (139) "there does not appear to have been any clandestine marriages" at the Savoy "until after the Marriage Act." Such a marriage took place there in 1596. Under date of June 14, in that year, W. Monne, Master of the Savoy, writes to Lord Cobham, whose grandchild and ward was a party to this contract, that he has "conferred with Archb. of Canterbury concerning Mr. Bigge, the chaplain of the Savoy who performed the marriage. Bigge said he thought he might well do it because his fellow chaplains were in the habit of marrying people without license. Archb. committed Bigge to the Gate House pending Cobham's pleasure, also ordered that 'no such disorderly marriage shall be offensively in the Savoy performed.'"—*Reports of the Hist. Manuscripts Commission*, V, 136, 139.

[1] HAMMICK, *Marriage Law*, 13, 14; *cf.* GEARY, *Mar. and Fam. Rel.*, 33.

[2] WALPOLE, *Hist. of Eng.*, IV, 69.

principle of toleration; though one ceases to be surprised by this fact when he remembers the disfranchisement of non-conformists and considers the shameful character of parliamentary representation which was then drawn largely from rotten or pocket boroughs under the control of a corrupt oligarchy.[1] During more than fourscore years repeated efforts were made in vain to gain relief for dissenters.[2] The Unitarians[3] were particularly active in the struggle for religious and civil liberty. The bill of 1826–27 introduced by William Smith in their behalf is especially worthy of notice, because in the committee it took the form of a provision for civil marriage before a justice of the peace, leading to a very lively discussion. The Marquis of Lansdowne defended the measure, not merely in the interest of the dissenters who by the existing law were forced to do violence to their consciences, but also in behalf of the clergy of the established church who should be relieved of the necessity of administering a religious rite for those receiving it only under compulsion.[4] On the other hand, the bill was

[1] *Cf.* GREEN, *Hist. of English People*, IV, 212, 124, 176 ff., 257; MAY, *Const. Hist.*, I, 15 ff., 263 ff. By the Toleration Act of 1 Will. and Mary dissenters were formally recognized and relieved from the pains and penalties attaching to non-conformity; hence thereafter marriages "according to their own forms and usages" were "treated as marriages *de facto*." The Hardwicke act robbed them of this privilege: HAMMICK, *Marriage Law*, 14.

[2] In favor of the dissenters bills were introduced, either in the Commons or in the Lords, in 1782 (HANSARD, *Par. Debates*, 2d series, 1825, XII, 1236 ff.), 1819 (*ibid.*, XL, 1200 ff., 1504 ff.), 1823 (*ibid.*, IX, 967 ff.), 1834 ("Bills, Public," 1834, II); and by Sir Robert Peel in 1835 ("Bills, Public," 1835, III). A bill for registration of marriages, births, and deaths was brought forward in 1834 ("Bills, Public," III); and already in 1833 a special committee to report on the state of the parochial registers and the necessary legislation was appointed by the Commons. This committee reported on Aug. 15 of the same year ("Reports, Committees," 1833, XIV). See the history of the attempts to grant relief to dissenters by OPPENHEIM, "Über Einführung der Civil-Ehe in England," *ZKR.*, I, 8–33.

[3] The Unitarians could not conscientiously make the declaration of belief in the Trinity contained in the Anglican marriage ritual: "I thee wed," etc., "in the name of the Father and of the Son and of the Holy Ghost": WALPOLE, *Hist. of England*, IV, 69–71, who discusses the efforts of William Smith and Lansdowne in their behalf.

[4] The same argument is advanced by a writer in the *Quarterly Review*, LI (1834), 493 ff., 513, 514.

opposed, not only on the old ground of violating the sanctity of matrimony, but also because the clergy, by being required to proclaim the banns in such cases and to certify the same to the justice, would thus suffer humiliation; and for the reason that the proposal smacked too much of the revolutionary ordinance of Oliver Cromwell.[1] Every attempt to gain justice for the dissenters failed until finally a signal victory for civil institutions was won in the epoch-making statute of 1836.

The long struggle to remedy the formal defects of the Hardwicke act met with somewhat earlier success. Much injustice and inconvenience grew out of the provision that banns must be proclaimed in churches or chapels where hitherto they had "usually been published." A stop was thus put to legal celebration in many places, especially in London; and "it was found that even St. Paul's Cathedral and Westminster Abbey were included in this prohibition, as no publication of banns had ever taken place in them."[2] Accordingly in 1781 a marriage solemnized in Buerlyhill Chapel, "erected in 1765 and then duly consecrated, and in which divine service had been publicly and regularly celebrated ever since, and wherein banns of marriage had been often published and marriages celebrated previous to the marriage in question," was annulled by the court of King's

[1] OPPENHEIM, *op. cit.*, 13–17: "Bills, Public," 1826–27, II. *Cf.* also WALPOLE, *Hist. of Eng.*, IV, 70, 71. GRIFFIN-STONESTREET, *Nuptiae Sacrae: Objections to the Amended Unitarian Marriage Bill* (London, 1828), is especially bigoted in his opposition, holding that the sanctity of matrimony will be violated; that the magistrate will have religious functions thrust upon him; and concludes with the remark (38) that "it is no recommendation of this measure, that it is in many parts a mere transcript of OLIVER CROMWELL'S method of putting down the offices of the Church by the Act of 1656." On the other hand, "A Presbyter of the Church of England," who objects to allowing "Socinian ministers" a share in the solemnization of marriages, admits that there is a real grievance and recommends the "alternative of a marriage before a civil magistrate, according to certain civil forms." To provide a model (31–37), he reprints the whole of Cromwell's ordinance of 1653. The measure is opposed in a spirit of intolerance by LE GEYT, *Observations on the Bill* (London, 1827).

[2] BUEN, *Parish Registers*, 146; *cf.* GEARY, *Mar. and Fam. Rel.*, 60, 61.

Bench.[1] An act was immediately passed to validate such marriages already solemnized;[2] and this was followed by various other statutes to legalize later marriages of the same kind.[3] More serious were the consequences of the clause making the express consent of parent or guardian in case of license absolutely essential to the valid marriage of minors. Through disregard of this provision, and for various other trivial deviations from the letter of the statute, many harsh cases of injustice arose. "A man was enabled to marry a woman solemnly in the face of the church, to live with her and acknowledge her publicly as his wife, and have issue by her,—and 25 years afterwards to bring a suit for annulling the marriage, on the ground that he himself had falsely and fraudulently sworn, in order to obtain the license, that she was 21 years of age, when she was in fact two months younger."[4] In another case,[5] "where a father had gone to

[1] Rex *v.* Northfield (1781), 2 Douglas, 658; GEARY, *loc. cit.*; BURN, *op. cit.*, 32 n. 2.

[2] 21 Geo. III., c. 53: *Statutes at Large*, VIII, 83. In the debate on the bill for this act Mr. Charles James Fox, "who appears," says Burn, "to have possessed an hereditary opposition to the Marriage Act of 1753," declared "that all persons who had solemnized marriages in any of these new chapels were at present liable to *transportation*. Under danger of that penalty stood . . . . a vast number of clergymen, and some prelates in the Upper House; but as America would not receive them, they must go to the *Justitia Hulk*, which to be sure would be a terrible thing, and he hoped the house would interfere to save these reverend, and right reverend gentlemen from so horrible a fate. It was an absolute fact that several, if not all, of the Bishops had transgressed in this way; and by the bye, the House might have the mortification to see Bishops in their lawn sleeves, instead of preaching the word, heaving ballast on the Thames."—BURN, *op. cit.*, 32, 33, note.

[3] 44 Geo. III., c. 77; 48 Geo. III., c. 127; 11 Geo. IV. (1830), c. 18. The statute of 6 Geo. IV., unlike all the preceding, validated future marriages in churches or chapels erected since 26 Geo. II., c. 33: GEARY, *op. cit.*, 61.

[4] HAMMICK, *Marriage Law*, 14, note, citing SIR JOHN STODDART'S *Letter to Lord Brougham on the Irish Marriage Cases* (1844), who says, referring to the facts mentioned in the text, "that was in the case of Hewett *v.* Bratcher (1809), in which I was counsel before the High Court of Delegates; and that court decided that agreeably to the Act of 1753, then in force, a marriage must, under such circumstances, be annulled." Compare also the similar case of Johnson *v.* Parker (1819), 3 Phillim., 39, where "the husband obtained a declaration of nullity because he was about six weeks under age at the date of the marriage, although he had himself sworn on applying for the licence that he was of age."—GEARY, *op. cit.*, 15. Other cases are mentioned in HANSARD, *Par. Debates*, XXXIX, 1466; XLI, 1445 (1st series).

[5] Hayes *v.* Watts (1819), 3 Phillim., 43.

America and was supposed dead, and the mother had given her consent, but the father had no knowledge of the marriage, it was declared void after eighteen years' cohabitation;"[1] for the father's consent, if living, was absolutely necessary. Nullity was even declared in one instance[2] "because the testamentary guardians who had consented were appointed by a will which turned out to be invalid because attested by only one witness."[3]

At length, after the nullification of marriage on technical or trivial grounds had become a "public scandal" and an intolerable hardship to individuals,[4] a remedy was found in the act of 4 George IV., c. 76, by which so much of the Hardwicke act as had not already been superseded[5] was repealed; and new and juster rules were substituted.[6] But this statute, whose more important provisions will hereafter appear, gave no relief to Roman Catholics or dissenters. To effect this, after various futile attempts, the civil-marriage law of 1836 was enacted,[7] simultaneously with another creating a new system of registration.[8] These three measures, with a few later modifications or additions, constitute the present law of England relating to the celebration and regis-

[1] GEARY, *op. cit.*, 14, 15.

[2] Reddall *v.* Leddiard (1820), 3 Phillim., 256. This case and others are discussed by PHILLIMORE, *Speech on the Marriage Act*, 23–45, an able exposition of the evils arising under the Hardwicke act.

[3] GEARY, *op. cit.*, 15, note.

[4] Compare GEARY, *op. cit.*, 15.

[5] In the preceding year, by 3 Geo. IV., c. 75, the provision of the Hardwicke act invalidating marriage of minors by license without consent, and some other defects, were remedied; but the eighth and following sections of the law prescribing more "stringent regulations to prevent clandestine marriage by licence," were repealed by 4 Geo. IV., c. 17, which enacted that "licences should be granted in the case of minors as under Lord Hardwicke's act": *cf.* HAMMICK, *Marriage Law*, 15, note; HANSARD, *Debates*, 2d series, VII, 702, 1635 (Commons); 1128, 1143, 1198, 1373, 1452 (Lords); and PHILLIMORE, *Speech on the Marriage Act*, 45 ff.

[6] The act of 4 Geo. IV., c. 76, may be found in HAMMICK, *op. cit.*, 269–80; and BURN, *Ecclesiastical Laws*, II, 433*d-h*; as also in the *Statutes at Large* for that year. *Cf.* HANSARD, *Debates*, 2d series, VIII, 80, 87, 123, 235, 623; IX, 540, 649; *Annual Register*, LXV, 89–93.

[7] 6 and 7 Will. IV., c. 85: *Statutes at Large*, 510–25; BURN, *op. cit.*, II, 433*u* ff.; HAMMICK, *op. cit.*, 282–96.

[8] 6 and 7 Will. IV., c. 86: *Statutes at Large*, 526–44; HAMMICK, *op. cit.*, 297–306.

tration of marriages. An analysis of their leading provisions will now be presented.[1]

It will be convenient first to notice the main features of the system of registration.[2] For the entire kingdom is appointed by the lord treasurer and the lords commissioners of the treasury a registrar-general whose office is in London and Westminster. Below the general registrar of births, deaths, and marriages are the "superintendent registrars," one in each union or parish, appointed by the Board of Guardians of the Poor; or, in default of such appointment, they may be nominated by the general registrar. The post is usually filled, however, by the clerk of the Board of Guardians. Below the superintendent registrars are the registrars of the districts. These are of two kinds: the registrar of births and deaths, appointed in the same way as the superintendent registrars; and the registrars of marriages, nominated by the superintendent of the union subject to the approval of the guardians,[3] or of the registrar-general, as provided by a later act.[4]

Co-ordinate with the civil registrars of marriages for the district are the ministers of the Church of England, and the ministers or accredited officers of other denominations, each of whom is required every quarter to transmit abstracts of all registrations to the superintendent, who, in his turn, reports to the registrar-general. The division of the union into districts, which usually correspond to the parishes, is

[1] For the debates on the acts of Will. IV. see HANSARD, *Debates*, 3d series, XXXI, 367–86; XXXII, 1093; XXXIV, 490–94, 539, 1021–39, 1309. *Cf.* the *Quarterly Review*, LVII, 248–53, for an article praising the conservative course of the Lords.

[2] For summary and discussion of the registration laws see BOHN, *Political Cyclopœdia*, IV, 625–28; SMITH, *The Parish*, 187–89, 457–60; FRIEDBERG, *Eheschliessung*, 413–19; ROBERTSON, in *Britannica*, XV, 566; HAMMICK, *Marriage Law*, 106 ff., 166–90, *passim;* GEARY, *Mar. and Fam. Rel.*, 133–37, *passim* as per index; MOORE, *How to be Married*, 60 ff.; ERNST, *Treatise of Mar. and Div.*, 10 ff.

[3] The appointment of the district registrars of marriages is provided for, not by the registration act, but by the marriage act of 6 and 7 Will. IV., c. 85, sec. 17.

[4] By 19 and 20 Vict., c. 119, sec. 15; HAMMICK, *op. cit.*, 327.

the duty of the guardians, subject to the approval of the registrar-general.

Marriage within the Church of England is regulated by the statute of 4 George IV., c. 76, and may be solemnized in the parish church or a chapel licensed by the bishop,[1] after publication of banns for three successive Sundays at morning service; or on production of the certificate of a superintendent registrar, which is equivalent to banns.[2] Parent or guardian may forbid the marriage of minors, but in case of banns express consent is not required. License in place of banns may be granted by the archbishop, bishop, or other authority, but only for solemnization within the church of the parish in which one of the parties has resided "for the space of fifteen days preceding." Before "a licence can be granted an oath must be taken as to the fact of residence;" that there is no legal impediment; and that the consent of parent or guardian has been obtained, if either of the parties is under twenty-one years of age.[3] The "marriage must be celebrated within three months after banns or licence, and between the hours[4] of eight and

[1] "With the consent of the patron and the incumbent."—4 Geo. IV., c. 76, sec. 3: HAMMICK, *op. cit.*, 270. See further details as to the places licensed, in 6 and 7 Will. IV., c. 85, secs. 26 ff.

[2] By 6 and 7 Will. IV., c. 85, sec. 1. But by 19 and 20 Vict., c. 119, sec. 11, celebration by a clergyman of the Church of England on certificate of the superintendent registrar is not obligatory: *cf.* HAMMICK, *op. cit.*, 87, 282, 313; GEARY, *Mar. and Fam. Rel.*, 58, 80, 85, 88, 94.

"In the year 1884, out of 144,344 marriages according to the rites of the Established Church, 128,107, or 89 per cent., were by banns, 12,188, or 8.5 per cent., by ordinary licence, 68, or .05 per cent., by special licence (of the archbishop), and 3,523, or 2.4 per cent., on superintendent registrar's certificate."—HAMMICK, *op. cit.*, 63, note. In 1889, 698 marriages in every 1,000 were according to the rites of the English church; and of these only sixteen were by certificate: GEARY, *op. cit.*, 58, note. See the discussion and the tables of statistics of marriages, 1841–88, in MOORE, *How to be Married*, 111–17, 166, 167.

[3] See the form of oath in GEARY, *op. cit.*, 49 n. 3; and MOORE, *op. cit.*, 120, who gives all the marriage forms. If the "defendant swears falsely it is not perjury, and only misdemeanour" (Regina *v.* Chapman, 1849, 1 Den., 432); and "the spiritual Court has no jurisdiction to punish such false oath" (Phillimore *v.* Machon, 1876, 1 P. D., 481); GEARY, *op. cit.*, 49, 50.

[4] Now between the hours of 8 in the forenoon and 3 in the afternoon: By 49 and 50 Vict., c. 14: HAMMICK, *Marriage Law*, 341.

twelve in the morning."[1] Care is taken to avoid the hardships arising from the rigidness of the Hardwicke act. "The penalty of nullity" is "confined to the case of persons wilfully procuring the celebration of marriage without due publication of banns, or without a licence from a person having authority to grant the same, or by any person not in holy orders, or elsewhere than in a church or chapel wherein banns" may "be lawfully published." The want of consent of parent or guardian, in case of minors, does not invalidate a marriage by license; but "in the event of any fraud practiced to procure the contract, the guilty party" forfeits "all property accruing from the marriage."[2]

The institution of banns, as already seen, is the ancient device of the church to secure publicity.[3] During the ages it has served a useful purpose, though from its very nature, even under the most stringent regulations, it is capable of serious abuse. But there are unmistakable signs that it has about run its course and must soon yield to more effective methods, such as those prescribed by the civil-marriage act. The "unsuitableness of banns to the present state of society," remarks Mr. Hammick, appears as early as 1868 in the report of the Marriage Law Commissioners.[4] They say that "in populous places it seems universally agreed that no real publicity is obtained by banns, which afford no safe-guard against improvidence, illegality, or fraud, and are frequently, from their great number, an inconvenient and unseemly interruption to divine service." The old sentiment against publicity is a strong motive for evasion. "The evidence which we have received," add the commissioners, "abun-

[1] Compare the clear summary of ROBERTSON, in *Britannica*, XV, 566; BURN, *Ecc. Laws*, II, 433*f-h*; MOORE, *How to be Married*, 1-23.

[2] HAMMICK'S summary in *Marriage Law*, 15.

[3] Above, chap. viii, sec. iv, pp. 359 ff.

[4] HAMMICK, *op. cit.*, 65. *Cf. Report of the Royal Commission, 1868*, 53-58, 34, 36-38, for the responses of various lay and ecclesiastical persons.

dantly proves that the dislike of this mode of publication tends to promote clandestinity rather than to prevent it, by inducing many persons to resort for marriage to places where they are unknown."[1] Nor does the testimony against the efficiency of banns come from lay sources alone. The bishop of Durham, in this same report, declares that "at present there is no punishment to any party making a false statement" in order to have banns published in a parish where he does not reside; "whilst it is quite impossible for the clergyman, who is now by law punishable for celebrating such marriages, to ascertain the falsehood of such statements, as his time, if his parish be large, is entirely occupied by his other necessary duties." Hence he believes that it would be "advantageous to assimilate the law to that which regulates the notice of banns at the registry, and to make a false statement in either case perjury."[2] In like spirit the bishop of Ely refers to the difficulty of the clergyman's making suitable examination. "All such inquiries," he says, "are inevitably left to the parish clerk, whose interest it is to inquire as little as possible. Hence, if any persons desire to contract an illegal marriage, they choose one of the populous parishes of our large towns, where they readily escape notice."[3] The uselessness of banns in such places is further made very clear "not only by ninety-nine couples being asked on one Sunday at St. Pancras, but also by 189 couples being asked in the cathedral church at Manchester on the 11th December, 1864, and 202 couples on the 10th December, 1865," while on this last-named day at St. Mary's, Lambeth, the banns of 125 couples were published. In many of these

[1] *Report*, xlii; in HAMMICK, *op. cit.*, 65, note.

[2] REV. S. C. WILKS, in his *Banns, a Railroad to Clandestine Marriages* (1864), proposed "a simple form of declaration, to be incorporated with the Banns Book": HAMMICK, *op. cit.*, 66, note.

[3] From suggestions made to the Marriage Law Commissioners, and published in their *Report*, 1868: in HAMMICK, *op. cit.*, 354–62.

cases, merely the names were mentioned, "unaccompanied by any announcement of condition — whether bachelors, widows," or spinsters.[1]

The civil-marriage act of 1836 owes its adoption mainly to the influence and exertion of Lord John Russell, by whom it was proposed. In a measure, however, the way had been cleared for it by the bill of the preceding year introduced by Sir Robert Peel. This was received in a spirit of conciliation and compromise, showing that the period of harsh intolerance was fast approaching its end.[2] The bill failed of passage, mainly because as a half-way measure it did not satisfy the non-conformists. For it permitted the civil form of marriage only to those declaring their unwillingness to accept the established rites; and thus, it was asserted, a stigma would be put upon the dissenters to whom matrimony was not less holy than it was to the adherents of the English church.[3] Moreover, the magistrate of the hundred before the marriage was solemnized was required to send the certificate to the clergyman of the parish for registration.[4] But it is highly significant that in the debate proposals were made involving

[1] Suggestion of Major Graham, late Registrar General, in the commissioners' *Report:* HAMMICK, *op. cit.*, 356:

"Without proposing that banns should be prohibited, the commissioners recommend that the publication should not be required by law as a condition either of the lawfulness or of the regularity of marriage, being of opinion that 'every useful purpose which can be answered by the publication of banns in the Established Church may be equally answered by the mere fact of notice to the officiating minister.'"— HAMMICK, *op. cit.*, 65. In general, on the present law of banns, see *ibid.*, 62–80; ERNST, *Treatise of Mar. and Div.*, 8; GEARY, *Mar. and Fam. Rel.*, 37–46, where the judicial decisions are cited; and MOORE, *How to be Married*, 1 ff.

[2] On asking leave to present the bill, March 17, 1834, Sir Robert Peel delivered an elaborate speech explaining the need of reform and giving a history of the attempts to remedy the hardships arising from the existing marriage laws since 1753. His speech was well received by all parties: see the summary of Peel's speech and of the debate on the bill in OPPENHEIM, in *ZKR.*, I, 19–33. In general on the struggle for relief of dissenters see MAY, *Const. Hist.*, II, 362–64, 392–95; FRIEDBERG, *Eheschliessung*, 391–401; FISCHEL, *Eng. Const.* (London, 1863), 84.

[3] Lord John Russell's speech: OPPENHEIM, in *ZKR.*, I, 34; *cf. ibid.*, 31; and BEARD, *Notes on Lord John Russell's Mar. Bill* (London, 1834), demanding full civil marriage for dissenters, not mere "relief" through the Church of England.

[4] MOLESWORTH, *Hist. of Eng.*, I, 339; WALPOLE, *Hist. of Eng.*, IV, 71, 72.

the essential elements of the two great measures of the next year. A system of civil registration of births, deaths, and marriages was suggested; while it was urged, either that the civil form of solemnization should be made optional for all, not merely restricted to non-conformists; or else it should be made obligatory for all, leaving it free to the parties in every case, after the lay ceremony, to avail themselves of the rites of their own religious body.[1]

Nevertheless the act of 1836 was adopted only after a prolonged contest in the House of Commons.[2] By this statute the religious celebration prescribed by the Anglican rubric is preserved, and two additional methods of procedure are created: (1) by certificate of the superintendent registrar without license; (2) or by such certificate with a license.

When procedure is by the first method,[3] notice must be given "to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days" previous. This notice is then entered in a marriage notice book "open at all reasonable times without fee to all persons desirous of inspecting the same;" and thereafter for twenty-one days the notice or a true copy is to be suspended or affixed "in some conspicuous place in the office" of the superintendent.[4] "In the body or at the foot" of the notice a "solemn declaration" as to residence, necessary consent, and the absence of impediment of any kind must be subscribed by one of the parties.[5] After twenty-one

[1] OPPENHEIM, in *ZKR.*, I, 31, 32. The bill was not satisfactory to Lord John Russell; hence it was dropped when he superseded Peel as prime minister.

[2] For a contemporary account of the debate on the bill see the *Annual Register*, LXXVIII, 122-34; a summary by OPPENHEIM, in *ZKR.*, I, 33 ff.; also MOLESWORTH, *Hist. of Eng.*, I, 386-88; WALPOLE, *Hist. of Eng.*, IV, 69-73. See HANSARD, *Debates*, as cited above.

[3] On marriage by certificate without license see MOORE, *How to be Married*, 60 ff.; GEARY, *Mar. and Fam. Rel.*, 80 ff., 85 ff.; HAMMICK, *Marriage Law*, 118 ff., 127 ff.

[4] By 19 and 20 Vict., c. 119, secs. 3-5.

[5] By 19 and 20 Vict., c. 119, sec. 2. *Cf.* ROBERTSON, in *Britannica*, XV, 566; BURN, *Eccl. Laws*, II, 433*x-y*; HAMMICK, *Marriage Law*, 89 ff., 319, 320; GEARY, *Mar. and Fam. Rel.*, 80-85.

days,[1] if no valid objection be filed by parents or others, a certificate is issued by the superintendent, and the marriage may be celebrated at any time within three months of the entry of the notice.[2] After issuing the certificate the marriage may be celebrated in either of the following forms: (1) Before the superintendent registrar, in the presence of a district registrar and two witnesses—a mere declaration of assent and no religious rites whatever being required. (2) In any registered building by a minister of any sect according to the religious rites of the same. Here also the registrar of the district and two witnesses must be present. (3) According to the rites of the Jews and Quakers in duly certified buildings. A building may be registered by the superintendent registrar on receipt of a written petition from "any proprietor or trustee," accompanied by a certificate signed in duplicate by twenty householders at the least, that such building has been used by them during one year at the least as their usual place of public worship and that they are desirous that the place shall be registered.[3] (4) Marriages may also be solemnized by certificate in lieu of banns in an Anglican church or chapel, if the consent of the minister be obtained.[4] In all cases the place of marriage must be mentioned in the certificate, and the celebration must occur between the hours of 8 in the forenoon and 3 in the afternoon.[5]

[1] In the interval the notice was originally to be read by the clerk of the Board of Guardians at their sessions for three successive weeks: FRIEDBERG, *Eheschliessung*, 416; BURN, *Eccl. Laws*, II, 433*y*. This provision is repealed by 19 and 20 Vict., c. 119.

[2] *Cf.* 19 and 20 Vict., c. 119, sec. 4. The form of certificate is given by HAMMICK, *Marriage Law*, 333, 334; MOORE, *How to be Married*, 148. All the forms are given by MOORE, *ibid.*, 120–63.

[3] 6 and 7 Will. IV., c. 85, sec. 18. *Cf.* BURN, *Eccl. Laws*, II, 433*bb*.; BOHN, *Pol. Cyc.*, III, 329; FRIEDBERG, *op. cit.*, 413–15; HAMMICK, *op. cit.*, 118 ff., 122 ff.

[4] BURN, *Eccl. Laws*, II, 433*x*; ROBERTSON, in *Britannica*, XV, 567; FRIEDBERG, *op. cit.*, 416; BOHN, *op. cit.*, III, 322.

[5] Between 8 and 12 in the forenoon by 6 and 7 Will. IV., c. 85, sec. 20. This was changed by 49 and 50 Vict., c. 14, sec. 1.

If the parties wish to avoid delay and so great publicity, they may proceed by the superintendent's certificate and license. These may be obtained on one[1] full day's notice to the registrar of "the district in which one of the persons resides, together with a declaration that he or she has resided for fifteen days therein, that there is no impediment, and that the necessary consents if any have been obtained. The notice is not exhibited in the registrar's office."[2] After obtaining the license, the marriage may be celebrated in either of the first three modes above mentioned; but no superintendent's license may be issued for a marriage according to the forms of the English church, that right being still an "ecclesiastical monopoly." Any person guilty of wilfully making any false statement in procuring certificate or license is liable to the penalties of perjury;[3] and if any persons "knowingly and willfully intermarry," in any place other than that mentioned in the certificate or without notice, certificate, or license, as required by law, or in the absence of the registrar where his presence is required, their marriage, except in certain specified cases, is null and void.[4] False statements as to consent subjects the offender to the penalties of perjury, but does not invalidate the marriage.

As to the form of civil contract, it is only essential that somewhere in the ceremony the following declarations be introduced. Each of the parties must say:

"I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D."

[1] Original act said "seven days": BURN, *op. cit.*, II, 433*aa*, changed by 19 and 20 Vict., c. 119, sec. 9. *Cf.* GEARY, *Mar. and Fam. Rel.*, 87; HAMMICK, *op. cit.*, 324.

[2] ROBERTSON, in *Britannica*, XV, 567; BURN, *op. cit.*, II, 433*z-bb*.

[3] Re-enacted by 19 and 20 Vict., c. 119, sec. 18.

[4] By 6 and 7 Will. IV., c. 85, sec. 42. *Cf.* BOHN, *Pol. Cyc.*, III, 324; BURN, *op. cit.*, II, 433*ii*; HAMMICK, *op. cit.*, 295.

And each must say to the other:

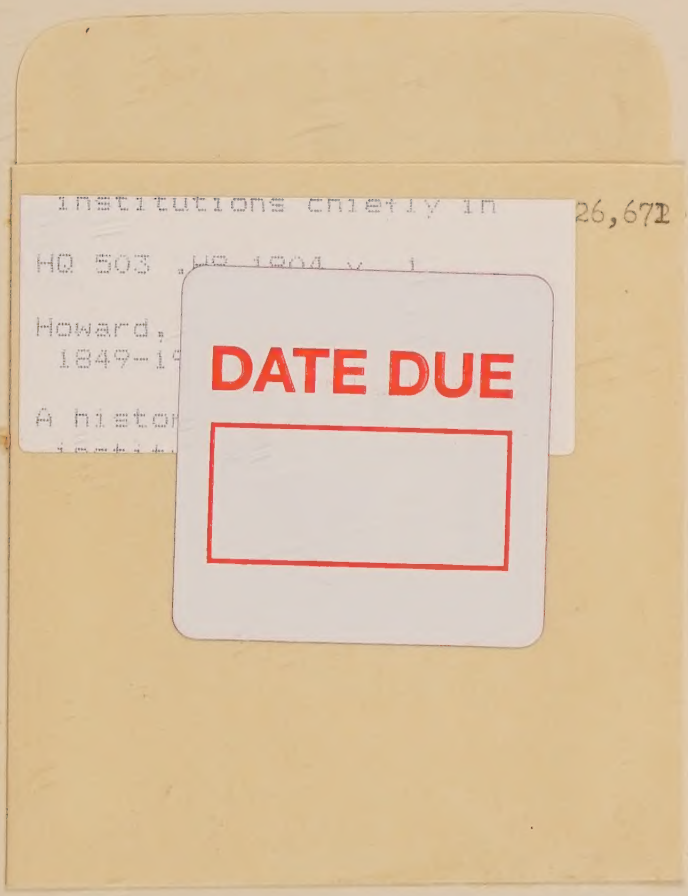
"I call upon these witnesses here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife (or husband)."[1]

Thus English marriage ends, as it began, in a simple contract; but the state has succeeded in imposing upon it the condition of publicity—a task which the church first attempted, but failed to accomplish.[2]

[1] 6 and 7 Will. IV., c. 85, sec. 20. *Cf.* BURN, *op. cit.*, II, 433*cc*; BOHN, *op. cit.*, III, 323; HAMMICK, *op. cit.*, 289, 145; MOORE, *How to be Married*, 49.

[2] By the act of 7 and 8 Vict., c. 81 (1844), supplemented by 34 Vict., c. 110, and 26 and 27 Vict., c. 27, the essential features of 6 and 7 Will. IV., c. 85, were adopted for Ireland, the proximate cause being the excitement aroused by the case of the Queen *v.* Millis, 1843: see chap. vii, sec. ii, p. 316, above; and also HAMMICK, *Marriage Law*, 232–39; GEARY, *Mar. and Fam. Rel.*, 557 ff.

In Scotland except as restricted by 19 and 20 Vict., c. 96, the principles of the canon law are still in force, "subject only to such modifications as it has undergone from time to time by the application of the rules of evidence established in that country, and the course of judicial decisions" (HAMMICK, *op. cit.*, 221). But in 1856 by 19 and 20 Vict., c. 96, called Lord Brougham's Act, for a contract to be valid, the parties must have resided in Scotland at least twenty-one days preceding the ceremony. This put an end to "Gretna Green" weddings, but otherwise private contracts are still legal. Thus three kinds of marriages are recognized: (1) "regular marriages" before a minister according to custom or statute; (2) "irregular marriages" *per verba de praesenti;* (3) "irregular marriages" *per verba de futuro, subsequente copula;* but in this case the contract must be written or proved by confession on oath: HAMMICK, *op. cit.*, 221 ff. That Scotch marriages are binding in England was established by the celebrated judgment of Lord Stowell in Dalrymple *v.* Dalrymple in 1811: DODSON, *A Report of the Judgment*, 1 ff., 97 ff.; STEPHENS, *Laws of the Clergy*. I, 672, 688; FRIEDBERG, *Eheschliessung*, 426, 427; KENT, *Commentaries*, II, 87. In general, see GEARY, *op. cit.*, 531 ff.; FRIEDBERG, *op. cit.*, 428, 437–59; *idem*, *Geschichte der Civilehe*, 18 ff.; MOORE, *How to be Married*, 85 ff.; ROBERTSON, in *Britannica*, XV, 567; TEGG, *The Knot Tied*, 216–23 (Gretna Green); JEAFFRESON, *Brides and Bridals*, II, 203–16 (Gretna Green); GLASSON, *Histoire du droit et des inst.*, VI, 162–69; WHARTON, *Laws Rel. to Women*, 265–98 (present English law), 298–303 (Scotch law); STEPHENS, *Laws of the Clergy*, I, 671–779; CARLIER, *Mar. aux États-Unis*, 41 ff.



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